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No. 60-1765

In the Supreme Court of the United States

OCTOBER TERM 1961

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC., *Petitioner*,

v.

HYDROLEVEL CORPORATION, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED APRIL 24, 1961
CERTIORARI GRANTED JUNE 12, 1961

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"Tr." refers to the official trial transcript;

"CX" refers to a Court Exhibit in the District Court;

"PX" refers to a Plaintiff's Exhibit in the District Court;

"DX" refers to a Defendant's Exhibit in the District Court;

"AX V." refers to the ASME Exhibit Volume submitted to the Court of Appeals; and

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IN THE

United States District Court

FOR THE EASTERN DISTRICT OF NEW YORK

DOCKET ENTRIES [App. 1-12*] No. 75 Civ. 1360

HYDROLEVEL CORPORATION [v.] I.T.T., et al

HYDROLEVEL CORPORATION, a New York Corporation

~~INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION, a Delaware Corporation,~~

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC., a New York Corporation, and

~~THE HARTFORD STEAM BOILERS INSPECTION AND INSURANCE COMPANY, a Connecticut Corporation~~

15 U.S.C. §§ 1, 2, 7, 15, 18, 26
VIOLATION OF CLAYTON ACT AND SHERMAN ACT. RESTRAINT OF TRADE
Seeks: Injunction

ATTORNEYS

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•••

[* The trial court docket entries are set forth in their entirety at pp. 1-12 of the Appendix ("App.") submitted to the Court of Appeals.]

8/19/75	Complaint filed. Summons issued.	(1)
•••		
9/12/75	ANSWER of deft [ASME] filed.	(5)
9/22/75	ANSWER of Hartford Steam Boiler Inspection and Insurance Co. filed.	(6)
•••		
9/26/75	AMENDED ANSWER of the American Society of Mechanical Engineers filed.	(8)
•••		
10/21/75	ANSWER and counterclaim filed (of Deft ITT).	(11)
•••		
10/30/75	Answer to Counterclaims filed	(15)
•••		
4/7/76	By WEINSTEIN, J. Order dtd 4-5-76 that the motion of The American Society of Mechanical Engineers for leave to serve a second amended answer is granted filed.	(46)
4/8/76	Notice of Entry filed.	(47)
4/8/76	Second Amended Answer filed. (THE AMER. SOCIETY OF MECH. ENGS.)	(48)
•••		
5/25/76	Notice to take deposition of T. Hardin filed.	(52)
•••		
8/9/76	Suggestion of death upon the record of T. R. Hardin filed.	(64)
•••		
6/8/77	First amended answer & counterclaim of ITT filed. mg	(89)
•••		
10/12/77	WEINSTEIN, J.—order of dismissal with prejudice as to deft Hartford Steam Boiler & Insurance Co. filed. ld	(110)
•••		

6/6/78	By WEINSTEIN, J.—Order dtd 6/6/78 dosmissing [sic] action with prejudice, filed. jm Clerk directed to close case. jm (As to ITT only)	(153)
•••		
9/18/78	By WEINSTEIN, J.—Order dtd. 9/18/78 GRANTING stipulation that pltff be granted leave to file its First Amended Complaint and deft ASME leave to file its amended Answer filed rh.	(163)
•••		
12/18/78	AMENDED ANSWER of deft The American Society of Mechanical Engineers ("ASME") to "First Amended Antitrust Complaint" filed rh	(192)
•••		
1/22/79	Before WEINSTEIN, J.—Case called. Both sides present. Pltff withdraws counts 2, 3, & 4 of complaint & are to go to trial on count one of complaint. Parties agree to try issue of liability first. Trial ordered and begun. Jurors were selected and sworn; pltff opens; deft opens; Trial contd to 1/23/79. filed rh	....
1/23/79	Before WEINSTEIN, J—Case called. Trial resumes. Trial cont'd. to 1/24/79. ls	....
1/24/79	Before WEINSTEIN, J.—Case called. Trial resumes. Trial continuted [sic] to 1/25/79 rh	....
1/25/79	Before WEINSTEIN, J.—Case called for trial, trial resumed. Pltff re: Defts motion for a directed verdict denied. Trial contd to 1/26/79.	....
1/26/79	Before WEINSTEIN, J.—Case called for trial and trial resumed. Trial contd to 1/29/79. fy	....

1/29/79 Before WEINSTEIN, J.—Case called. Trial resumes. Deft rests. Deft's motion for mistrial denied. Deft's motion to strike from Pltff's case all references to Wall Street Journal article, etc. denied: Deft's motion to strike from evidence all reference of anti-competitive actions, etc. denied; Deft's motion for directed verdict denied. Court reviews jury charge with counsel. Summation by Pltff. Summation by Deft. Rebuttal by Pltff. Trial cont'd. to 1/30/79, at 9 a.m. Is ....

1/31/79 Before WEINSTEIN, J.—Case called. Trial resumes. Court charges jury. Jury retires for deliberations at 10:00 a.m. Order of sustenance signed (lunch) at 4:45 p.m. jury returns, finding for the pltff. Finding the deft liable. Motion to set aside verdict denied. Trial on liability concluded. Trial on damages to commence 1/31/79 at 10:00 a.m. Is ....

1/31/79 Before WEINSTEIN, J.—Case called; trial on damages ordered & begun; Jury on liability still sitting; Trial contd to 2/1/79. rh ....

•••

2/1/79 Before WEINSTEIN, J.—Case called. Trial resumes; pltff rests; Trial contd to 2/2/79 at 9:00 a.m. rh ....

2/2/79 Before WEINSTEIN, J.—Case called; Trial resumes; Defts rest; Rebuttal by pltff; Pltff rests; Defts motion for directed verdict denied; Court reviews charge with counsel; Summation by pltff; Summation by deft; Rebuttal summation by pltff; Court charges jury; Jury retires for deliberations at 10:30 a.m.; Defts motion

for mistrial denied; Jury returns at 4 p.m. with a verdict on damages in the amount of $3,300,000; pltffs to submit judgment; pltffs motion for injunctive relief denied; All motions with respect to equitable relief denied; Defts motions reserved for 10 days. rh ....

•••

2/7/79 Trial Brief of Pltff Hydrolevel Corp., filed. mw (207)

2/7/79 Trial Brief of The American Society of Mechanical Engineers, Inc. filed. mw (208)

•••

2/13/79 By WEINSTEIN, J.—Memo and Order dtd 2/13/79 that award of $7,500,000.00 fully compensates pltff and vindicates policy of antitrust laws reflected in trebling provision. Attys fees not warranted, decision limited to particular [sic] fcts and circumstances of case. Judgment greater than $7,500,000 would be excessive. Clerk directed to enter judgment in form of notice of settlement of counter-proposes judgment submitted by deft, filed. jm (211)

•••

2/14/79 By WEINSTEIN, J.—Order dtd 2/9/79 directing to hold judgement until defts motion to set aside case is heard, filed. jm (see 215)

2/14/79 Judgement dtd 2/14/79 pltff Hydrolevel Corp recover of deft American Society Mechanical Engineers sum of $7,500,000.00 with interest from entry date of this judgment at legal rate of 6% per annum w/o attys fees buth [sic] with costs and disbursements as taxed by clerk, filed. jm (216)

•••

2/16/79	Proposed JUDGMENT (unsigned), filed. P.C. sent	mw	(218)
2/27/79	Notice of Motion (RET: 3/8/79 at 9:30 a.m.) of deft for an Order (1) setting aside the verdict and the judgment entered thereon and directing that, notwithstanding the verdict, judgment be entered in favor of deft and against pltff pursuant to Rule 50(b) of the FRCP or, in the alternative (2) granting deft a new trial on the issues of liability and damages pursuant to Rule 59 of FRCivP or, in the alternative, (3) amending the judgment to reduce the amount of damages set forth therein pursuant to Rule 59(e) of the FRCivP filed.	rh	(219)
2/27/79	Deft's Memo of Law in Support of Deft's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, a New Trial filed.	rh	(220)
2/27/79	Deft's Memo of Law in Support of Deft's Motion for an Order Denying a New Trial Conditioned on Pltff's Accepting a Remittitur filed.	rh	(221)
2/27/79	By WEINSTEIN, J.—ORDER dated 2/26/79 that (1) Execution of, and any proceedings to enforce the judgment entered herein on 2/14/79 be and the same hereby are stayed until ten days after the last to occur of (a), etc. (see Order) (2) Deft shall, in lieu of a supersedeas bond, deposit as security cash or securities substantially as set forth upon the attached list marked as Exhibit A hereto; this security shall be held in an escrow or		

	similar account at the Chemical Bank upon such terms as will (a), etc. (see Order) filed together with annexed Exhibit A. rh	(222)
•••		
2/26/79	Before WEINSTEIN, J.— Case called. Deft's motion for judment [sic] notwithstanding verdict, denied; defts motion for remittitur denied.	
•••		
3/28/79	Notice of Appeal filed & mailed to C of A with certified copy of docket sheet. As of 4/3/79. fc	(235)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

• • •

GENERAL DOCKET

• • •

79-7254

DATE	FILINGS—PROCEEDINGS
4/2/79	Copies of notice of appeal and district court docket entries filed on behalf of appellant American Society of Mechanical Engineers, Inc.
•••	
4-10-79	Copy of notice of cross-appeal filed on behalf of Hydrolevel Corp.
•••	
4-30-79	Record on appeal filed (original papers of district court)
5-4-79	Scheduling order #3 filed (parties have agreed that ASME shall be deemed appellant, cross-appellee)
5-16-79	Stipulation for deferred appendix filed
5-17-79	Scheduling order #4 filed
6-5-79	Order substituting Patterson, Belknap, Webb & Tyler for Carter Ledyard & Milburn for appellant ASME
6-5-79	Appellant ASME motion for extension of time to file brief filed 2720 (order endorsed 6-6-79 granting motion)
•••	
9-7-79	Appellant ASME page proof brief filed, pfs. (6cc)

9-13-79 Appellant ASME page proof brief (corrected copy) filed, pfs (6cc)

11/9/79 Appellee Hydrolevel Corp. page proof brief filed, pfs.

11/19/79 Appellee Hydrolevel motion for extension of time to file joint appendix filed, pfs. 901 (*order endorsed 11/19/79: granted*) deferred appendix on or before 12/4/79; appeal ready to be heard the week of 1/7/80)

11/27/79 Appellant ASME page proof reply brief filed, pfs.(6cc)

12/4/79 Appellant ASME deferred joint appendix filed (volumes 1-5), pfs.

12/6/79 Appellant ASME exhibit volume filed, pfs.

12/4/79 Appellee Hydrolevel exhibit volume filed, pfs. (volumes 1-3)

12-17-79 Appellee Hydrolevel motion for leave to file supplemental joint appendix exhibit volume filed 125X (*Order endorsed 12-20-79; granted*)

12-17-79 Appellee Hydrolevel final brief filed

12-18-79 Appellant ASME final brief filed

12-18-79 Appellant ASME final reply brief filed

12-20-79 Appellee Hydrolevel supplemental joint appendix exhibit volume (4cc) filed

3/12/80 Case argued before: Lumbard, Friendly, Meskill, C. JJ.

11/24/80 Judgment affirmed in part; reversed and remanded in part, published opinion, Lumbard, C.J.

11/24/80 Judgment filed.

12/5/80 Appellee Hydrolevel motion for extension of time to file a petition for rehearing filed, pfs. (*order endorsed 12/5/80: granted to 12/15/80*)

12/5/80 Appellant ASME affidavit in support of motion for extension of time to file petition for rehearing filed.

12/5/80 Appellee Hydrolevel itemized and verified bill of costs filed, pfs.

12/15/80 Appellee Hydrolevel petition for rehearing with suggestion for rehearing en banc filed, pfs.

12/15/80 Appellant ASME petition for rehearing with suggestion for rehearing en banc filed, pfs.

1/22/81 Order denying petition of Hydrolevel for rehearing with a suggestion for rehearing en banc filed.

1/22/81 Order denying petition of ASME for rehearing with a suggestion for rehearing en banc filed.

1/29/81 Appellant ASME motion for stay of mandate pending filing of petition for a writ of certiorari filed, pfs. (*order endorsed 2/2/81: granted*)

2/13/81 Appellant ASME motion for clarification of order staying issuance of mandate filed, pfs. (motion for continuance) (*order endorsed* 2/19/81: granted; mandate stayed pending timely filing of a petition for writ of certiorari and until final disposition by the Supreme Court)

5/1/81 Notice of filing of petition for writ of certiorari filed (S.C. #80-1771)

5/4/81 Notice of filing of petition for writ of certiorari filed (S.C. #80-1765)

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF NEW YORK

HYDROLEVEL CORPORATION,
a New York Corporation,

Plaintiff,

—against—

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.,
a New York Corporation,

Defendant.

CIVIL ACTION No.
75 C 1360

FIRST AMENDED ANTITRUST COMPLAINT

Jury Trial Demanded

Hydrolevel Corporation, by its attorneys, demanding a trial by jury, brings this civil action against the named defendant and complains and alleges as follows:

JURISDICTION AND VENUE

1. This complaint is filed and the jurisdiction of this Court is invoked in this action instituted against the defendant:

(a) under Sections 4 and 16 of the Clayton Act, as amended, 15 U.S.C. §§ 15 and 26, and 28 U.S.C. § 1337 for violations of:

(i) Section 1 of the Sherman Act, 15 U.S.C. § 1, and

(ii) Section 2 of the Sherman Act, 15 U.S.C. § 2.

(b) under the Court's pendent jurisdictional powers, because the federal and state claims are derived from the same operative facts, and should be tried in a single proceeding, for

(i) violations of Section 340 of the N.Y. Gen. Bus. Law, commonly known as the Donnelly Antitrust Act, New York Consolidated Laws, Chapter 20, Article 22, and

(ii) the plaintiff's claim of trade libel (also described as "injurious falsehood" and "disparagement of property") and tortious interference with commercial relations.

2. Venue exists by virtue of Sections 4 and 12 of the Clayton Act, as amended, 15 U.S.C. §§ 15 and 22, and 28 U.S.C. § 1391(c). The defendant resides, is found, has an agent, transacts business or is doing business within the Eastern District of New York and the unlawful activities complained of herein were carried out, in whole or in part, within this District.

PARTIES

3. Plaintiff Hydrolevel Corporation is a corporation organized and existing under the laws of the State of New York with its principal place of business at 153 Verdi Street, Farmingdale, New York.

4. Defendant The American Society of Mechanical Engineers, Inc. ("ASME") is a non-profit membership corporation organized and existing under the laws of the State of New York with its principal place of business at 345 East 47th Street, New York, New York. Its membership consists mainly of professional mechanical engineers located throughout the United States and in foreign countries.

5. Former defendant International Telephone & Telegraph Corporation ("ITT") is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 320 Park Avenue, New York, New York. In December 1971, ITT acquired and merged with McDonnell & Miller, Inc., an Illinois corporation, with the latter becoming the McDonnell & Miller unit of ITT's Fluid Handling Division ("M & M"). M & M was founded in 1924 and, at the time of the acquisition by ITT,

had a manufacturing facility in Chicago employing approximately 200 people and had sales representatives located throughout the United States, as does the M & M unit of ITT today. ITT is a diversified company with subsidiaries and divisions located throughout the United States and the world. In 1974, ITT sales were approximately $5.2 billion. Wherever in this complaint reference is made to defendant ITT, it shall be deemed to include both ITT and M & M, the latter both as an independent corporation prior to merger with ITT, and thereafter as a unit of ITT, unless the context requires otherwise. In 1970, ITT acquired approximately 99 percent of the outstanding stock of the Hartford Fire Insurance Corp., a Connecticut corporation which, as part of its assets, owned, and continues to own, approximately 11 percent of the outstanding common stock of defendant Hartford Steam Boiler Inspection and Insurance Company.

6. Former defendant Hartford Steam Boiler Inspection and Insurance Company ("Hartford Steam") is a corporation organized and existing under the laws of the State of Connecticut with its principal place of business at Hartford Plaza, Hartford, Connecticut. In 1974, Hartford Steam's net premiums were approximately $62 million and its assets were approximately $143 million. It is licensed in all fifty states and the District of Columbia. As alleged in paragraph 5 above, a significant indirect interest in Hartford Steam was acquired by ITT prior to 1971.

DEFINITIONS

7. The term "boiler" means a closed vessel in which water is heated, steam is generated, steam is superheated, or any combination thereof, under pressure or vacuum, for use external to itself, by the direct application of heat. The term "boiler" includes fired units for heating or vaporizing liquids other than water where these units are separate from processing systems and are complete in themselves.

8. The term "pressure vessel" means a vessel in which pressure is obtained from an external source or the application of heat from an indirect source.

9. The term "boiler water level control" includes every type, model, brand and/or category of low water cutoff, water feed regulator, low water cut-off and water feed regulator combination, pump controller, low water cut-off and pump controller combination, electric water feeder, low water cut-off and electric water feeder combination, make-up water feeder and other electrical or mechanical device designed to sense the presence or absence of water at a particular level within a boiler and to maintain such particular level of water. Boiler water level controls may be generally divided into two types, the float-type and the probe-type.

TRADE AND COMMERCE

10. It is estimated that approximately 500,000 boilers of various types and sizes are installed annually throughout the United States. Because of the high pressure and temperatures under which many boilers operate, and because of the potentially serious consequences which can accompany boiler failures (including explosions which can, and have, resulted in loss of life), the ASME, the boiler manufacturing industry, insurance companies, and governmental agencies have together sought to minimize the risk of boiler failure, primarily by setting or adhering to standards for the safe design, construction and operation of boilers.

11. Throughout the United States, the ASME is the leading entity involved in setting standards for safe construction of boilers and pressure vessels. To this end, the ASME has formulated and promulgated its ASME Boiler and Pressure Vessel Code (the "ASME Code"), which sets forth minimum construction requirements, including materials specifications, for the design, fabrication, inspection, and certification of boilers and pressure vessels. This Code has been formally adopted by the ASME, and the ASME's Boiler and Pressure Vessel Committee has the primary responsibility for the fomulation, revision and interpretation of the Code. For many years, the ASME Code has been the accepted industry standard by boiler manufacturers, insurers and users, and governmental bodies throughout the United States. This Code has also been incorporated by reference

into the laws of many states and municipalities. In addition, a number of federal agencies have required compliance with the ASME Code in their regulations and specifications.

12. The ASME Code Symbol Stamp (the "ASME Stamp"), is issued by the Boiler and Pressure Vessel Committee to authorized manufacturers who use it to impress its symbol upon boilers or pressure vessels after they have been inspected to reflect manufacture in accordance with the provisions of the ASME Code. The ASME has granted authority to use the ASME Stamp to a large number of domestic and foreign manufacturers (the largest potential group of customers for boiler water level controls) and because of the widespread acceptance of the ASME Code, continued approval by the ASME through its grant of the ASME Stamp is an absolute necessity for such manufacturers to continue in business. The ASME Stamp affords municipal and state authorities and industrial purchasers quick visual assurance, without the necessity of detailed proof, that a boiler or pressure vessel has been manufactured and inspected in accordance with the requirements of the ASME Code. Many large industrial purchasers designate in their bid specifications that, in addition to meeting the standards of the ASME Code, boilers and pressure vessels bear the mark of the ASME Stamp. As stated above, the ASME Stamp has, over the many years of its use, acquired enormous commercial value and legal significance as a shorthand symbol of quality.

13. Part of the ASME Code requires that on certain types of boilers, constituting a significant portion of the boilers in place and installed yearly, a low water cut-off be installed, and even where not required by the ASME Code, many boiler manufacturers, insurers and users, and government agencies require that a low water cut-off be part of an approved boiler. The ASME Boiler and Pressure Vessel Committee and its Heating Boilers Subcommittee have jurisdiction over Section IV, Heating Boilers, of the ASME Code, which contains provisions relating to low water cut-offs.

14. Manufacturers may not use the ASME Stamp on products that do not meet the standards of the ASME Code, including the low water cut-off provisions of that Code. Under the circumstances, manufacturers are reluctant to install on their boilers low water cut-offs or other boiler water level controls that do not clearly meet ASME Code standards.

15. Boiler inspection and insurance companies conduct periodic inspections of boilers and pressure vessels at the locations where they are installed throughout the United States to ensure that the boilers and pressure vessels meet ASME Code standards. The companies provide insurance coverage for boiler and pressure vessel failures, including coverage for property damage and personal injuries.

16. Hartford Steam is, and has been for many years, the leading insurer of heating boilers, and sells approximately one-third of all such insurance written yearly in the United States.

17. The Boiler and Pressure Vessel Committee of ASME which has jurisdiction over the formulation and interpretation of the Code as well as the issuance of the Stamp to "approved" manufacturers, has been composed of employees of boiler manufacturers, boiler users, public regulatory authorities, insurance and inspection companies, and manufacturers of boiler materials or boiler accessories. An employee of ITT, John James, has served as vice-chairman and chairman of the Heating Boilers Subcommittee of the Boiler and Pressure Vessel Committee during the period covered by this complaint. An employee of Hartford Steam, T. R. Hardin, has served as chairman of the Heating Boilers Subcommittee during the period covered by this complaint. The fact that employees of ITT and Hartford Steam have simultaneously served as officials of ASME has enabled ITT and Hartford Steam to influence decisions of defendant ASME to the detriment of plaintiff, and has intimidated boiler manufacturers into favoring the purchase of ITT-manufactured boiler water level controls over the controls manufactured by the plaintiff.

18. Boiler water level controls are installed as original equipment on many new boilers (the original equipment manufacturer or "OEM" market). Boiler water level controls and components thereof are also installed as replacements or new equipment on boilers and pressure vessels already in use (the replacement market). The total volume of sales of boiler water level controls as original equipment and in the replacement market is approximately $12 million yearly.

19. Since at least 1965, ITT has been the leading firm in the boiler water level control industry accounting for an estimated 85 percent of sales yearly. Until 1974, ITT manufactured and marketed only the float-type boiler water level controls for boiler applications.

20. The marketing of boiler water level controls is done both by boiler water level control manufacturers directly to customers (usually boiler manufacturers for use as original equipment for installation on new boilers, the "OEM" market) and by wholesalers and manufacturers' representatives (both to the OEM market and to plumbing supply houses or others for the replacement market). Most boiler water level controls, including those of plaintiff and ITT, are sold and transported across state lines into states different from the state in which the low water cut-offs are manufactured and also into foreign countries, and the violations alleged herein have had a direct and substantial effect upon this interstate and foreign commerce.

21. Since its incorporation in 1965, plaintiff has been engaged in the development, manufacture and sale in interstate and foreign commerce of probe-type boiler water level controls bearing the trademark "Sensit Safgard" ("Safgard"). Until very recently, ITT, which for many years has had and maintained monopoly power in this industry and has accounted for approximately 85 percent of the sales of boiler water level controls, has manufactured and sold only float-type boiler water level controls. The persistent record of failures of boiler water level controls which have resulted in boiler failures, including boiler explosions, led the principals

of Hydrolevel, Messrs. Russell Rymer and Dominick DeLeonardis, to investigate and develop the unique probe-type Safgard control, portions of which have been patented, and which has been recognized to be a new concept in low water cut-off safety controls. Factory Mutual Engineering Corporation, a leading boiler insurer in the United States, referred to Safgard as a "reliable and fail-safe control," in its publication, *Preventing Low Water Boiler Failures.*

FRAUDULENT CONCEALMENT

22. The acts and practices described herein were inherently selfconcealing and were fraudulently concealed by defendants and their co-conspirators through the use of deceptive practices and techniques which prevented their detection by plaintiff. The plaintiff, with the exercise of due diligence, could not have determined the existence of the unlawful schemes and practices which are the subject of this complaint until March, 1975. Such acts, practices and techniques included but were not limited to the circumstances surrounding the publication of false disparagement of Hydrolevel low water cut-offs by the ASME Boiler and Pressure Vessel Committee on April 29, 1971 and the destruction by ITT of documents and files relating to such publication. Because of a conspiracy to conceal the existence and terms of this publication from plaintiff, it was not made available to plaintiff until 1974. Such acts, practices and techniques also included but were not limited to the dealings between ITT, as the leading company in the boiler water level control industry, and its prospective and existing customers, such dealings including secret inducements to take full requirements from M & M, predatory pricing practices and publications of disparaging and false statements about Hydrolevel products and services to customers, all to the detriment of plaintiff.

OFFENSES

COUNT I

Combination and Conspiracy in Restraint of Trade and to Monopolize

23. Plaintiff here repeats and realleges the averments contained in paragraphs 1 through 22 of this complaint.

24. Various other persons, firms and corporations have participated as co-conspirators with the ASME and the former defendants in the offenses charged in this complaint and have performed acts and made statements in furtherance thereof. These co-conspirators include but are not limited to John James, former Vice President-Research of M & M and former vice-chairman and chairman of the ASME Subcommittee on Heating Boilers, and T. R. Hardin, former Vice President-Engineering of Hartford Steam and predecessor to John James as chairman of the ASME Subcommittee on Heating Boilers.

25. Beginning at a time presently unknown to plaintiff, but as early as 1965, and continuing thereafter to the present, defendant ASME, ITT, Hartford Steam and co-conspirators have engaged in an unlawful combination and conspiracy unreasonably to restrain and to monopolize interstate commerce in boiler water level controls in the United States and in foreign commerce, in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. Said offense is continuing and will continue unless the relief hereinafter prayed for is granted.

26. ITT has for some time possessed monopoly power in the interstate and foreign boiler water level control markets. Said former defendant presently accounts for approximately 85 percent of annual sales of boiler water level controls in the United States.

27. In effectuation of the combination and conspiracy described above, defendant ASME, ITT, Hartford Steam and co-conspirators deliberately and intentionally engaged in

various acts, behavior and practices, including but not limited to those set forth below:

(a) Defendant ASME has caused and permitted its reputation and power as the industry standard-setter to be perverted and influenced by ITT and Hartford Steam to promote unfairly ITT boiler water level controls and to discourage the development and sale of Hydrolevel boiler water level controls;

(b) The ASME Boiler and Pressure Vessel Committee, as presently constituted and organized, is inherently anticompetitive and therefore constitutes a continuing combination and conspiracy in violation of the antitrust laws;

(c) Defendant ASME has conspired with ITT and Hartford Steam in the unlawful, deliberate acquisition and maintenance of ITT's monopoly power in the boiler water level control industry;

(d) Defendant ASME, ITT, and Hartford Steam have denied plaintiff equal access to and foreclosed it from equal consideration by the ASME, its Boiler and Pressure Vessel Committee and Subcommittee on Heating Boilers, and other ASME committees, subcommittees, and entities;

(e) Defendant ASME, ITT, and Hartford Steam have utilized the power and reputation of ASME in the industry to publish the representation and to otherwise create the impression that the Safgard boiler water level control did not meet the standards embodied in the ASME Code;

(f) Defendant ASME, ITT, and Hartford Steam have induced customers to refrain from purchasing boiler water level controls from plaintiff by (i) publishing disparaging and false statements about the products and services of plaintiff, such publications being accompanied by an intent to cause competitive injury, personal hostility, non-belief in the statements published, and bad faith, and (ii) creating the impression and belief

that the purchase of plaintiff's products by original equipment manufacturers would jeopardize such customers' continued status as an approved holder of the ASME Stamp;

(g) Defendant ASME, ITT and Hartford Steam have purposely induced or otherwise caused third persons not to enter into or continue business relations with plaintiff Hydrolevel Corporation;

(h) ITT has acquired and merged with M & M;

(i) ITT has acquired a significant indirect interest in Hartford Steam;

(j) ITT has utilized its economic power by means of threats and coercion, and by other means, to cause customers to purchase substantially all of their boiler water level control requirements from ITT;

(k) ITT has utilized its economic power by means of announcements of products in advance of their availability to cause customers to refrain from purchasing boiler water level controls from plaintiff;

(l) ITT has utilized its economic power, by means of threats and coercion, and by other means, to cause distributors to refrain from selling boiler water level controls manufactured by plaintiff;

(m) ITT has engaged in predatory pricing of ITT products to induce prospective and existing customers of ITT to purchase ITT's boiler water level controls;

(n) ITT has precluded plaintiff from selling boiler water level controls by means of exclusive dealing arrangements with leading distributors in the boiler water level industry;

(o) ITT has conditioned the sale of one of its products upon the purchase of a separate product or products ("the full line");

(p) Hartford Steam has utilized its power and reputation as the largest insurer of boilers in the United States unfairly to promote and encourage the sale of

ITT boiler water level controls and discourage the sale of Hydrolevel controls by means of agreements with co-defendants to boycott, coerce, and intimidate, and by boycotts, coercion, and intimidation.

COUNT II
Donnelly Antitrust Act

28. Plaintiff here repeats and realleges the averments contained in paragraphs 1 through 22 and 27 of this complaint.

29. Beginning at a time presently unknown to plaintiff, but as early as 1965, and continuing thereafter to the present, defendant ASME, ITT, Hartford Steam and co-conspirators have engaged in a contract, agreement, arrangement and combination whereby a monopoly in the conduct of the boiler water level control business in this state is or may be established and maintained, and whereby competition in the boiler water level control business in this state is, or may be restrained, and whereby for the purposes of establishing and maintaining such monopoly and of unlawfully interfering with the conduct of the boiler water level control business in this state, trade and commerce is, or may be restrained, all in violation of Section 340 of the N.Y. Gen. Bus. Law, commonly known as the Donnelly Antitrust Act, New York Consolidated Laws, Chapter 20, Article 22. Said offense is continuing and will continue unless the relief hereinafter prayed for is granted.

30. In effectuation of the contract, agreement, arrangement and combination described above, defendant ASME, ITT, Hartford Steam, and co-conspirators deliberately and intentionally engaged in various acts, behavior and practices, including but not limited to those set forth above.

COUNT III
Trade Libel

31. Plaintiff here repeats and realleges the averments contained in paragraphs 1 through 22 and 27 of this complaint.

32. Defendant ASME, ITT, and Hartford Steam have engaged in an unlawful combination and conspiracy to cause the publication of untruths disparaging the products and services of plaintiff, such publication being accompanied by an intent to cause competitive injury, personal hostility, nonbelief in the statements published, and bad faith. These untruths were published maliciously and without reasonable or probable cause to believe in the truth thereof. These publications of injurious falsehoods constituted, and continue to constitute, the tort of trade libel (also described as "injurious falsehood" and "disparagement of property").

COUNT IV

Tortious Interference with Commercial Relations

33. Plaintiff here repeats and realleges the averments contained in paragraphs 1 through 22 and 27 of this complaint.

34. Defendant ASME, ITT, and Hartford Steam have engaged in an unlawful combination and conspiracy purposely to induce or otherwise cause third persons not to enter into or continue business relations with plaintiff Hydrolevel Corporation, without privilege to do so, and are liable to Hydrolevel for the harm caused thereby.

INJURY TO PLAINTIFF

35. The unlawful conduct above described has for some time threatened, and continues to threaten, elimination and removal of plaintiff as a competitor in the production and sale of boiler water level controls in interstate and foreign commerce.

36. The unlawful conduct above described has impaired the ability of plaintiff to compete effectively for business in the production and sale of boiler water level controls in interstate and foreign commerce and has impeded the growth of plaintiff in size and profitability.

37. The unlawful conduct above described has caused substantial reductions in the quantity of boiler water level

controls sold by plaintiff and has caused substantial reductions in the level of prices obtained by plaintiff for such boiler water level controls.

38. The unlawful conduct above described has caused, and will continue to cause, plaintiff to be deprived of sales of boiler water level controls, and payment derived therefrom, that could have been obtained in a free and open market, in the absence of the wrongful and monopolistic acts of defendant.

PRAYER

Wherefore, plaintiff Hydrolevel Corporation hereby demands judgment on each and every Count against defendant ASME and prays for:

1. Damages in an amount of at least $2,300,000, to be trebled according to law, for injury to its business and property, together with the costs of suit, including a reasonable attorneys' fees;

2. A permanent injunction prohibiting, enjoining and restraining defendant ASME from continuing the violations of the laws as herein alleged;

3. Compensatory and punitive damages in an amount presently undertermined by reason of malicious publication of injurious falsehoods and tortious interference with commercial relations; and

4. Such other and further relief as the Court may deem just and proper.

s/ HENRY M. LLOYD

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Attorneys for Plaintiff Hydrolevel Corporation

JURY DEMAND

Please Take Notice that plaintiff demands a trial by jury pursuant to Rule 38(b) of the Federal Rules of Civil Procedure of all issues triable of right by a jury.

[Certificate of Service omitted]

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF NEW YORK

HYDROLEVEL CORPORATION, a New York Corporation, *Plaintiff,* —*against*— THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC., a New York Corporation, *Defendant.*	75 Civ, 1360 (J.B.W.) AMENDED ANSWER TO "FIRST AMENDED ANTITRUST COMPLAINT"

Defendant The American Society of Mechanical Engineers ("ASME") by its attorneys Carter, Ledyard & Milburn, for its answer to the "First Amended Antitrust Complaint," upon information and belief—

1. Admits that jurisdiction is sought to be lodged in this Court by the allegations of statutory provisions in paragraph 1(a) of the complaint, but denies that the Court has proper pendent or other jurisdiction over the matters alleged in paragraph 1(b) of the complaint.

2. Denies the allegations contained in paragraph 2 of the complaint.

3. Lacks knowledge or information sufficient to form a belief with respect to the truth of the allegations contained in paragraph 3 of the complaint.

4. Admits the allegations contained in paragraph 4 of the complaint.

5. Lacks knowledge or information sufficient to form a belief with respect to the truth of the allegations contained in paragraph 5 of the complaint.

6. Lacks knowledge or information sufficient to form a belief with respect to the truth of the allegations contained in paragraph 6 of the complaint.

7, 8 and 9. Subject to possible engineering or other differences, accepts for the purposes of this case the definitions contained in paragraphs 7, 8 and 9 of the complaint, except lacks knowledge or information sufficient to form a belief with respect to the truth of the allegations contained in the final sentence of paragraph 9 of the complaint and denies that such definitions, or any of them, establish or define any relevant market or sub-market for the purposes of this case.

10 and 11. Lacks knowledge or information sufficient to form a belief with respect to the truth of the allegations contained in paragraphs 10 and 11 of the complaint, except admits that because of the serious consequences which can accompany boiler failures, including explosions and loss of life, ASME has formulated and promulgated the ASME Boiler and Pressure Vessel Code (the "Code") for safe construction of boilers and pressure vessels, which contains certain minimum requirements relating to the construction and use of boilers and pressure vessels, and that the Boiler and Pressure Vessel Committee has the primary responsibility for the Code's formulation, revision and interpretation.

12. Denies the allegations contained in paragraph 12 of the complaint and alleges that ASME issues its Code Symbol Stamp (the "Stamp") to authorized manufacturers who impress its Symbol upon boilers or pressure vessels to reflect manufacture in accordance with the provisions of the ASME Code; alleges that the inspection of boilers is not performed by ASME but is performed by inspectors licensed by a State or Province and, in some cases, by the National Board of Boiler and Pressure Vessel Inspectors and who are employed by a State or Province or by an insurance company; admits that ASME has issued the Stamp to domestic and foreign manufacturers of boilers and pressure vessels; and (subject to possible occasions of misuse of the Stamp) admits the allegations contained in the third, fourth and fifth sentences of paragraph 12 of the complaint except denies that the presence of the Stamp on a boiler demonstrates inspection; lacks knowledge or information with respect to the accuracy of the adverbs and adjectives contained therein, and alleges

that compliance with the Code is frequently specified in the laws of the states and other jurisdictions as one means of meeting required safety standards.

13. Lacks knowledge or information with respect to the accuracy of the adverbs and adjectives contained therein, but otherwise admits the allegations contained in paragraph 13 of the complaint.

14. Denies the allegations contained in paragraph 14 of the complaint except alleges that low water cut-off devices are required by the Code but that no particular design or construction is specified.

15. Admits the allegations contained in paragraph 15 of the complaint except denies that such inspections are to insure compliance with the ASME Code (which governs construction rather than operation and maintenance) and alleges that the inspections are to insure that the operation and maintenance of the boilers and pressure vessels meet the law and regulations of the jurisdictions in which they are located, and to insure that the boilers and pressure vessels remain insurable.

16. Lacks knowledge or information sufficient to form a belief with respect to the truth of the allegations contained in paragraph 16 of the complaint.

17. Denies the allegations contained in paragraph 17 of the complaint except admits that the Boiler and Pressure Vessel Committee of ASME has been composed of persons who (while they do not represent particular companies or organizations in the course of their Code Committee activities) have recognized background and experience in such categories as manufacturers, users of the products for which codes are formulated, manufacturers of material or accessories, regulatory authorities, insurance inspection, and others of general background such as educators or consulting engineers; admits that in April 1971 Mr. T. R. Hardin (who, when not engaged in his ASME activities, was Executive Vice President of Hartford Steam) was Chairman of the Heating Boilers Subcommittee and that in March 1972 Mr. John James (who, when not engaged in his ASME activities,

was Vice President of research for, or a consultant to, McDonnell & Miller division of ITT) was Vice Chairman of the Heating Boilers Subcommittee.

18. Lacks knowledge or information sufficient to form a belief with respect to the truth of the allegations contained in paragraph 18 of the complaint.

19, 20 and 21. Lacks knowledge or information sufficient to form a belief with respect to the truth of the allegations contained in paragraphs 19, 20 and 21 of the complaint, except denies the last clause of the last sentence of paragraph 20 and denies any violations by ASME.

22. Denies the allegations contained in paragraph 22 of the complaint.

23. Repeats its responses to the allegations contained in paragraphs 1 through 22 of the complaint.

24 and 25. Denies the allegations contained in paragraphs 24 and 25 of the complaint.

26. Lacks knowledge or information sufficient to form a belief with respect to the truth of the allegations contained in paragraph 26 of the complaint.

27. Denies the allegations contained in paragraph 27 of the complaint.

28. Repeats its responses to the allegations contained in paragraphs 1 through 22 and 27 of the complaint.

29 and 30. Denies the allegations contained in paragraphs 29 and 30 of the complaint.

31. Repeats its responses to the allegations contained in paragraphs 1 through 22 and 27 of the complaint.

32. Denies the allegations contained in paragraph 32 of the complaint.

33. Repeats its responses to the allegations contained in paragraphs 1 through 22 and 27 of the complaint.

34. through 38. Denies the allegations contained in paragraphs 34 through 38 of the complaint.

FOR A FIRST AFFIRMATIVE DEFENSE

The complaint fails to set forth facts sufficient to state a claim upon which relief can be granted as against this defendant.

FOR A SECOND AFFIRMATIVE DEFENSE

By reason of the provisions of Section 215 of the New York Civil Practice Law and Rules, any claim based upon any publication by this defendant is barred.

FOR A THIRD AFFIRMATIVE DEFENSE

The alleged claims for violations of the New York State Anti-Monopoly Law (the "Donnelly Act") are barred by the applicable statute of limitations, Section 340, N. Y. Gen. Bus. Law, subd. 5.

FOR A FOURTH AFFIRMATIVE DEFENSE

This Court lacks jurisdiction over all alleged claims other than those for violations of the federal antitrust laws.

FOR A FIFTH AFFIRMATIVE DEFENSE

The alleged claims for violations of the federal antitrust laws are barred by the applicable statute of limitations, 15 U.S.C. § 15b.

FOR A SIXTH AFFIRMATIVE DEFENSE

A. In its letter dated April 29, 1971 identified in plaintiff's answers dated December 9, 1975 to ASME's interrogatories (a true copy of which letter is annexed hereto as Exhibit A) ASME responded to an inquiry from one of its members concerning the proper interpretation of a portion of the ASME Heating Boilers Code relating to the operation of low water fuel cut-offs.

A.1. A low water fuel cut-off is a safety device, not an operating control.

A.2. It is the intent of the relevant paragraph of the ASME Heating Boilers Code that a low water fuel cut-off operate immediately and positively when the boiler water

level falls to the lowest visible part of a properly-positioned water gauge glass.

A.3. There are many designs of heating boilers.

A.4. If a time-delay feature is incorporated in a low water fuel cut-off, it is possible, depending upon the method of installation of the low water fuel cut-off and the design of the boiler, that the boiler water level could fall to a dangerous point during the time-delay period.

B. By reason of the foregoing, the statements in the letter dated April 29, 1971 (Exhibit A) are true.

FOR A SEVENTH AFFIRMATIVE DEFENSE

A. The statements contained in the letter of April 29, 1971 (Exhibit A hereto) were made by ASME in response to an apparently legitimate inquiry concerning the proper interpretation of provisions of the ASME Code dealing with the safe construction of boilers and pressure vessels; the statements were made in good faith, without malice, in the belief of the truth thereof, and in furtherance of ASME's legitimate interest in the promulgation of safety standards for boilers.

B. By reason of the foregoing, such statements were privileged.

FOR AN EIGHTH AFFIRMATIVE DEFENSE

The claims asserted in Count IV and in paragraph 27(g) of the complaint have been released and discharged as against ASME by plaintiff's release of such claims as against ITT, an alleged joint tort-feasor.

FOR A NINTH AFFIRMATIVE DEFENSE

A. Upon information and belief, plaintiff has released ITT and Hartford Steam from liability for the claims made in this action, in which ITT and Hartford Steam are alleged to be joint tort-feasors with ASME.

B. Upon information and belief, the consideration received by plaintiff for releasing ITT and Hartford Steam from liability was in the total amount of $800,000.

C. By reason of the foregoing, pursuant to § 15-108 of the New York General Obligations Law, plaintiff's claim against ASME is reduced by $800,000 or by the amount of ITT's and Hartford Steam's equitable shares of any damages suffered by plaintiff, whichever is the greatest.

D. If plaintiff suffered any recoverable damages by reason of any of the matters alleged in ths complaint, ITT and Hartford Steam should equitably bear the whole of such damages.

E. By reason of the foregoing, plaintiff cannot recover damages from ASME in this action.

WHEREFORE, defendant ASME demands dismissal of the complaint, together with its costs and disbursements and such other and further relief as may be proper.

Dated: New York, New York
December 4, 1978.

CARTER, LEDYARD & MILBURN

By s/ LOUIS L. STANTON, JR.
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[Exh. A, Hoyt Letter to Mitchell of April 29, 1971, omitted; letter appears at J.A. 64]

[CERTIFICATE OF SERVICE OMITTED]

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF NEW YORK

Trial Court Colloquy with Respect to ASME's Motion for a Directed Verdict at the Close of Plaintiff's Case

[Tr. 436; App. 593*]

MR. STANTON [ASME trial counsel]: The defendant moves under Rule 50, your Honor, for a directed verdict on the grounds that no case has been made on the portion now being tried, that is to say, the issue of conspiracy. Most fundamentally, it seems to us in that issue is that there be an agreement and here, nowhere among the mass of paper, the mass of speeches that we have heared [sic] has there been a bit of evidence that there was an agreement between any of the parties to the alleged conspiracy to do anything to injure the plaintiff.

Failing the essential element of agreement, nothing remains, and there is no reason for allowing the case to continue. We make this submission with respect and with our own knowledge of the proof that we think lurks in the documents which have been marked this morning, most of which are not basically unfamiliar to us. But taken at their highest, taken as a whole at its highest, this evidence rises no higher than to allow the inference that there may have been an agreement—

THE COURT: I don't know about that. If all

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* Pursuant to Court Rule 30.5, the citations in brackets indicate where the printed material which follows may be found in the reporter's transcript of proceedings. "Tr." refers to the page of the official trial transcript where the printed material appears; "App." refers to the page of the Appendix submitted to the Court of Appeals where that page of the trial transcript also may be found.

[Tr. 437; App. 594]

you had was the original issue of the letter, and even a conference, I don't think I would let it go to the jury. After all, you can't have an organization like this held responsible where some businessman wants to use or abuse his position, given the best possible posture to the plaintiff's case.

So even though M & M wanted to use your client as a vehicle for getting some advantage, I don't think that is enough to hold you liable. But once having had the matter brought to its attention and having made clear to permanent employees of rather high rank that a possible injustice has been done it might be thought by the trade to indicate disapproval. It does seems to me that it can be argued that the failure at that point to take reasonable steps, whatever they may be and I am not saying that you didn't do reasonable things, I make no such finding. Without taking reasonable steps to clarify the situation to the trade, it could be considered as an implicit joining of a conspiracy already entered into.

MR. STANTON: Perhaps some of it is abstract, but we have to deal with the evidence here which shows that within two weeks after—that may not be

[Tr. 438; App. 595]

accurate—within five or six weeks after the letter from Mr. Rymer complaining was received, the matter was placed on the agenda for two committees, it was considered by those comittees, the letter was changed to take care of the point that Mr. Rymer raised—

THE COURT: I think you could argue it wasn't changed. A separate letter was issued to Hydrolevel but there was no indication in the Hydrolevel letter that was a modification of the earlier letter. It could be argued that a forthright approach to the problem would have said to Hydrolevel "on such and such a date, in answer to M & M's inquiry we gave the following letter. We have now reconsidered it and we wish to clarify it in order to avoid doing harm to you and the clarification is as follows:"

Then Hydrolevel could have taken that letter and gone out and issued it to the trade. The argument is that you didn't publish it in your magazine or whatever your trade publication is.

MR. STANTON: None of these were published at that time.

THE COURT: I understand. It can be argued that at this point you knew there could be substantial

[Tr. 439; App. 596]

harm done to a company—a small company which was from your point of view an outsider when you had somebody in the inside that was abusing your facilities. It is a very difficult position for a group like yourself to be in. I understand that, because you have all of these engineers who might want to use the group for their own advantage and for that of their company.

I would think if I were deciding the case, I would decide for the defendnt [sic] on what I have heard now and dismiss it on the ground that I wasn't persuaded. That is not my position. I have to decide whether a reasonable juror might possibly be persuaded and I think that is the case.

MR. STANTON: Taking all that your Honor has outlined—

THE COURT: I don't know. Is my analysis faulty? It seems to me that is the heart of the case.

MR. STANTON: With all respect, I think it is. I think it ignores or brushes over the fundamental element of a conspiracy which is to agree to the purpose of somebody who has a purpose. Here there is no purpose on behalf of ASME to injure this plaintiff.

[Tr. 440; App. 597]

None has been demonstrated—

THE COURT: There does not have to be a motive.

MR. STANTON: I am talking about any act which indicates an interest to any program.

THE COURT: They did issue a letter, that is an act. If it is an inadequate letter deliberately designed to be inadequate,

it is clear, or if they failed to act that could be a joining of conspiracy. If I am going to rob a bank and I pay off a policeman or tell my friend or just take a policeman and say, "Turn your back," and he turns his back, that is act or if he doesn't pull out his gun, that is an act. You don't have to take affirmative action in order to join a conspiracy. If your lack of action is designed to aid the conspiracy you are a part of the conspiracy, as I understand the law. I may be wrong.

MR. STANTON: But here there is no evidence that the first letter was designed—that's the evidence that is missing.

THE COURT: But it can be argued, but that it was designed by M & M—

MR. STANTON: On what evidence can it be argued?

[Tr. 441; App. 598]

THE COURT: On the way they used it and the way they got it.

MR. STANTON: The way they got it was to write a letter which came through ASME's normal process, was administered, answered, came back, signed in the usual way—

THE COURT: I understand that.

MR. STANTON:—and out it goes. Where is the complicity of M & M? Where is the bribing of the policeman that you mentioned? Where is anybody asked to turn their back?

THE COURT: Because you see, M & M's personnel is a member of one of your committees.

MR. STANTON: Here we come to the agency point—

THE COURT: You have the argument that the society is protecting its own, that these are all old people who are helping each other. You have the insiders and the outsiders and the insiders are trying to protect each other.

MR. STANTON: If a reasonable juror accepted it, it would be accepted on myth and suspicion. There is no evidence that

there was [sic] insiders or outsiders or anyone protecting the old boys.

[Tr. 442; App. 599]

THE COURT: M & M had a member on the committee, didn't it?

MR. STANTON: Yes, they did. They had a member on the committee—

THE COURT: Apparently the clerk's office or whoever it was on staff knew that and they had dealt with these people. Hydrolevel didn't have anybody on the inside there.

MR. WILLIAMSON [Hydrolevel trial counsel]: May I add one point? This is a point of information. A prima facie case is shown in Exhibit 38, their answers to interrogatories. One of the charts shows—

MR. STANTON: What is that?

MR. WILLIAMSON: This is ASME's answer to our interrogatories and they have a chart section four. It shows that on that subcommittee—the constitution gives express authority and not implicit authority—there has been one member—one user and one that manufactured probes, M & M. 23 years he is on there when he is only supposed to be there for three years. As it shows, one of the abuses shows is to have the dominant member—

THE COURT: That seems to me slight. As a member of the Bar Association Committees, I know

[Tr. 443; App. 600]

that happens. It is a difficult thing. I am cognizant of the problem because the Bar Association could be exactly in this position. It is difficult.

MR. STANTON: In all respect not if you read our brief on agency that we submitted this morning.

THE COURT: You had your staff people who responded. If you didn't have that subsequent series of events, I would say no, but I think it can be argued that the subsequent letter to Hydrolevel was not a forthright addressing of the problem.

Here is a young struggling company who [sic] is in effect steamrolled over because—it can be argued—M & M has contacts within the organization.

MR. STANTON: That's abuse of ASME at the least.

THE COURT: It is abuse of ASME, but having brought the matter to ASME's attention, it can be argued that ASME should have taken forthright action to see that its position was not abused.

MR. STANTON: That raises the more difficult point whether ASME should involve itself in the market matters of which Mr. Rymer complained. Isn't it best, as a matter of public policy, when its function to stick to the technical matters on which

[Tr. 444; App. 601]

the committees dealt in '72—

THE COURT: But if it is going to have people in the industry who are dominant, its got to take precaution to see that it is not abused to keep out newcomers. Public meetings perhaps, people who are dominant can't come on or do sell the product. I don't know what can be done. It is an extremely difficult policy issue. I appreciate the difficulty of your position. If I were trying the case, I would end it now. I am not convinced myself, but that is not the issue for me. The question is whether a reasonable juror would be convinced.

At the least, at the moment, I will let it go forward. Let's see what you come up with. It is not an easy problem.

MR. WILLIAMSON: There is more to it.

MR. STANTON: Your Honor understands that we urge Standard Oil there is no such thing as an unwitting conspirator.

THE COURT: I don't say that you are unwitting.

MR. STANTON: There is no evidence that we were witting.

THE COURT: I don't agree with that. The implication is fairly clear that the matter was

[Tr. 445; App. 602]

brought to your attention and you understood by failure to act that you were going to harm Hydrolevel.

MR. STANTON: You are dealing with a request for publicity—

THE COURT: No, it is the nature of the letter that was sent. It was not a forthright—it could be argued a forthright letter correcting a previous letter that was now being circulated by a competitor.

MR. STANTON: It was the plaintiff who sent it out saying it completely solved the problem.

THE COURT: That is an argument that you could make because the plaintiff is in a position where it is going to have to make that contention. We have to put a good face on. You have to stand up with all due respect and say what a great case you have. You may or may not believe it. I would do the same thing. What we say publically [sic] doesn't mean that we think that is the case.

MR. WILLIAMSON: A regional man in the organization wrote back after the Minneapolis meeting and said that the letter that was sent out was pure bull and they should have put a full page ad in the magazine—

[Tr. 446; App. 603]

THE COURT: Regional man from whom?

MR. WILLIAMSON: The house [sic-Howse] letter which was marked in the sentence [sic-Senate] anti-trust committee proceedings.

MR. STANTON: Is it in evidence?

MR. WILLIAMSON: It is in evidence.

MR. STANTON: Is it in evidence here? If not, I don't think you ought to be referring to it.

THE COURT: If it is in evidence, I am not interested in it.

MR. WILLIAMSON: There is so much here that I can't specifically address it.

THE COURT: You should know what you have.

MR. STANTON: It is hardly our fault.

MR. WILLIAMSON: In any event, your Honor is absolutely correct, they continued to cover up—

THE COURT: It will not help you to overstate my position. I don't think I am absolutely correct. I have doubts about whether I am even correct.

MR. WILLIAMSON: I understand. We all know the burden is whether or not it is the best possible inference. They passed a resolution praising James and he writes the letter—he, James adds his own paragraph to the letter to reinject a doubt.

[Tr. 447; App. 604]

THE COURT: Very difficult problem.

MR. STANTON: I suggest there has been no showing that it is really wrong for James to make an inquiry to ASME for a commercial purpose.

THE COURT: There was nothing wrong with that inquiry as far as your client was concerned. It might have been a part of a nepharious [sic] scheme of his. It comes in in a routine way and it goes out.

MR. STANTON: And our function is to answer those clinically?

THE COURT: Correct.

MR. STANTON: And to continue to do so when a request is raised and not to get involved in the market version? We cannot know what customers were shown.

[Tr. 448; App. 605]

THE COURT: Well, I don't think—

MR. STANTON: It has to be answered in an engineering fashion.

THE COURT: I think it would be unreal to expect that your people didn't know what was happening once Hydrolevel brought it to your attention. That's where the difficulty comes, not the earlier—but the subsequent events and the lack of events.

I'm going to have to let it go forward. I'm sorry.

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IN THE

United States District Court

FOR THE EASTERN DISTRICT OF NEW YORK

TRIAL COURT'S INSTRUCTIONS TO THE JURY
ON THE ISSUE OF LIABILITY

[Tr. 1002; App. 1165]

THE COURT: All right. Good morning, everybody. I hope you—you all look rested and ready for your big examination. I am sure you'll pass. I am going to tell you what the law is and how it applies in the case.

It is your duty as jurors to follow the law as I state it. You are to decide the issues of fact according to this law. I have no view whatsoever as to who should win or who should lose this case, or what witnesses should be believed or what inferences should be drawn.

My sole purpose here is to see that both sides get a scrupulously fair trial and that you decide it according to the law. Is that clear? So if I said anything or did anything or questioned anybody in any

[Tr. 1003; App. 1166]

way, it was only to assist you. Do not give any greater weight to anything I said or did here. What I was doing was according to law as I saw it.

Now, I am going to use the words "burden of proof" in a variety of ways during the course of the case. It is important for you, I think, to assess the evidence with the concept in mind. When we say that a party has the burden of proof, we mean that with respect to that issue or that proposition of fact, that party must convince you that it is more liely [sic] than not that its contentions are true.

If you find that the evidence is eventually [sic] balanced, then the one with the burden of proof must lose on that issue. We do not expect certainty or even near certainty of proof in

a civil litigation. What the law expects is that the probabilities as determined by you from the evidence be in favor of the party who has the burden of proof on the issues.

The plaintiff here has the burden of proof. What I have said is not evidence. What the lawyers have said is not evidence. Do not speculate on why ITT or Hartford Steam or anybody else, individual or institution, is not in the case. You have only one issue before you. Is this defendant liable?

[Tr. 1004; App. 1167]

That's all.

The plaintiff, Hydrolevel, claims that the American Society of Mechanical Engineers entered into a conspiracy with McDonald [sic] and Miller, Hartford Steam Boiler Inspection and Insurance Company, and various boiler manufacturers, in violation of Sections 1 and 2 of the Sherman Anti-Trust Act, and that this caused economic injury to Hydrolevel.

Now, Section 1 of the Sherman Anti-Trust Act provides, quote, "Every contract, combination or conspiracy in restraint of trade or commers [sic] is illegal." And Section 2 provides, quote, "Every person who shall conspire with any other person to monopolize any part of the trade or commers [sic] shall be guilty of a violation of the anti-trust laws."

Of course, for this purpose, a corporation is a person. So the issues on this aspect of the case are, first, has ASME violated the Sherman Anti-Trust Act, either by conspiring to unreasonably restrain trade, or, by conspiring to maintain McDonald [sic] and Miller's alleged monopoly of the boiler water level control industry.

If your answer to question one is no, you should return a verdict in favor of ASME. But if

[Tr. 1005; App. 1168]

your answer is yes, then you have a second issue to determine; namely, has ASME's violation of the antitrust laws been a substantially [sic] or material cause of any injury or damage to the plaintiff's property.

At this stage of the case, we are not considering how much they were damaged, if they were damaged at all. Is that clear? Just whether they were damaged in a substantial way. If your answer to this question is no, you should return a verdict for the ASME. But if your answer is yes, then you should return a verdict in favor of the plaintiff.

Let's take up first the section 1 alleged violations. A conspiracy is a combination of two or more persons by concerted action to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means. So a conspiracy is a kind of partnership in which each member becomes the agent of every other member.

The essence of a conspiracy is a combination or agreement to violate or to disregard the law. Obviously, it does not have to be in the form of an agreement like you would use for buying a house. But there has to be a meeting of the minds and an agreement in a basic sense. You must be satisfied that

[Tr. 1006; App. 1169]

two or more individuals agreed to some action that violated the law, in this case, Section 1 or Section 2 of the Sherman Anti-Trust Act.

If you find that a conspiracy did exist, you must then examine the evidence in this case to determine whether ASME was a part of the conspiracy. If you are not satisfied that there was such a conspiracy, you need go no further. The mere fact that the alleged conspirators associated with each other and may have met together and discussed common interests does not establish proof of the existence of the conspiracy. Evidence of a meeting alone is not sufficient.

In order for you to find that ASME was a member of the alleged conspiracy, you must be satisfied that ASME, by work, deed or conduct, intentionally joined the conspiracy. Mere presence at the scene, whatever the scene is, in this sense here—it is not like a shooting, of course—even coupled with knowledge that wrongful conduct by others is being

engaged in does not support the inference of knowing and intentional attachment to the conspiracy.

Independent, unilateral action on the part of one alleged co-conspirator is also insufficient.

[Tr. 1007; App. 1170]

Plaintiff must show that ASME and the other alleged co-conspirators had a unity of purpose or common design and understanding, or a meeting of the minds in an unlawful arrangement. There must be some evidence that ASME participated in the conspiracy by having a commitment to a common end.

The evidence need not show that the members entered into any express or formal agreement, or that they directly by word spoken or in writing stated between themselves what this object or purpose was, or the details of that purpose, or the means by which the object of the purpose was to be—or the purpose was to be accomplished.

The burden of proof is to show that a conspiracy existed in that the members, in some way or manner, or through some contrivance, positively or tacitly, came to a mutual understanding to try to accomplish a common and unlawful plan. A person can become a member of the conspiracy without full knowledge of all the details of the conspiracy and everything that the other co-conspirators were doing. On the other hand, a person who has no knowledge of a conspiracy but who happens to act in a way which furthers some object or purpose of the conspiracy

[Tr. 1008; App. 1171]

does not become a member. He has to want to aid, knowing that there is some activity going on.

Before you may find that ASME has become a member of the conspiracy, a preponderance of the evidence must show that the conspiracy was knowinly [sic] formed and that ASME knowingly participated in the unlawful plan, with the intent to advance or further some object or purpose of the conspiracy. To participate or act knowingly means to act voluntarily, intentionally, and not because of a mistake or

accident or other innocent reason. There must be some consciousness of commitment to a common scheme.

[Tr. 1009; App. 1172]

THE COURT: There is no such thing as an unwitting co-conspirator. In this action, the plaintiff alleges that ASME conspired with McDonnell & Miller, Hartford and others. There has to, obviously, be more than one person involved in order for there to be a conspiracy. It means together with another.

But, of course, all of the people who have been mentioned here need not be members of the conspiracy, as long as there are at least two of them, including ASME. The plaintiff must show that ASME conspired with at least one other co-conspirator.

Hydrolevel and ASME are corporations. They can act only by their officers, agents, servants or employees. Therefore, whenever any mention is made that Hydrolevel or ASME did or did not do something, it means, of course, that the corporation, through its officers, agent, servants or employees, acting within the scope of their employment or authority, and on behalf of and for the benefit of the corporation, were acting or failing to act.

For a corporation to be held responsible for the acts or statements of an act, it is not necessary that the corporation specifically authorize the

[Tr. 1010; App. 1173]

agent to commit the act or make such statements. A corporation is legally bound by the acts and statements done or made within the scope of their express or apparent authority. By express authority is meant that type of authority specifically given to an agent by his superior. By apparent authority is meant that type of authority which outsiders would normally and naturally assume that the agent would have, in the light of his position with the company, and the circumstances surrounding his past conduct with the company or corporation.

Now, the law holds a corporation responsible for the unlawful act of its agents or officers, but only when those unlawful acts are performed within the scope of the authority of the officers and on behalf of the corporation.

There doesn't have to be any gain or even hope of gain by the defendant or its agents in order to find liability. You can act unlawfully to help yourself or your employer, to help another, to hurt another, or for no particular motive. But motive, obviously, or its lack, has a strong evidentiary function, because people usually act for reasons. People or institutions do not usually deliberately

[Tr. 1011; App. 1174]

break the law unless they have a strong reason to do so, and you should consider what the defendant, its staff or its committees seek to gain by violating the law.

Even if one or more of the members of the staff or of a committee or subcommittee of the defendant joined the conspiracy, that would not necessarily constitute a joining by the defendant. For the individual or individuals might be on an escapade or a frolic, as it is sometimes called, although there is nothing funny about what we are talking about, a frolic of his own. They might even be keeping it secret from others, in order to prevent those in authority to scotch the scheme, had they known about it in time.

The participation by staff, officers or committees and subcommittees must have been sufficiently pervasive to make it fair and reasonable to say that they were acting on behalf of the defendant, and that the defendant should be liable for their actions.

The problem is difficult, of course, because a corporation, as I have said, cannot act accept through its agents or employees or its shareholders

[Tr. 1012; App. 1175]

or its Board of Directors or other committees. But most actions and day-to-day decisions of corporations are accomplished by lower level agents.

Here the problem is compounded because unlike most private corporations, which are hierarchial in structure with a chain of command from the president on down, here the structure was apparently diffuse, with many private and public persons doing voluntary work through committees and subcommittees. This structure or the public purpose or the good done by the defendant would not, however, immunize it from liability for violation of the antitrust laws.

If the officers or agents act on behalf of interests adverse to the corporation or acted for their own economic benefit or the benefit of another person or corporation, and this action was not ratified or adopted by the defendant, their misconduct cannot be considered that of the corporation with which they are associated.

Acquiescence, however, with knowledge, or cooperation by the defendant in carrying out a plan or common scheme, can be considered by you, with all of the other evidence, in deciding whether the defendant itself had joined any illegal scheme to

[Tr. 1013; App. 1176]

restrain trade or monopolize.

The evidence must show that the agents were authorized, directly or indirectly, by the corporation, to undertake such actions. Otherwise, the corporation cannot be held responsible for the misconduct of its individual agents.

If you are satisfied that a conspiracy was formed, then you should separately consider whether ASME was, in fact, a member of that conspiracy, and as I have indicated, you should separately examine the acts and conduct of ASME as shown by the evidence. This is important because membership in a conspiracy must be established by evidence of the alleged conspirator's own conduct, his own remarks and statements and other evidence of what he did or said.

To state this in another way, thought [sic] McDonnell & Miller, Hartford Steam and various others are charged with being members of the alleged conspiracy, it is necessary for you to separately consider whether ASME, in accordance

with the evidence and the rules I have outlined, was a member of that conspiracy.

The mere fact that one or more of the other alleged co-conspirators intended to injury [sic] the

[Tr. 1014; App. 1177]

plaintiff in violation of the antitrust laws is not a basis for finding ASME leable [sic], unless you also conclude that ASME was a member of the conspiracy.

Well, that is what I told you at the outset. You are not here to determine whether somebody else did something wrong, but whether this particular defendant did something wrong. But, of course, in considering whether they did something wrong, you will have to consider whether there was an overall conspiracy, in the first place.

The Sherman Antitrust Act does not condemn all combinations or conspiracies which interrupt interstate commerce. It does not apply to restraints as such, but only to those which directly, immediately, and necessarily unreasonably affect commerce among the states or with foreign nations. Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce are not illegal unless they have, or intended to have, an effect on prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition.

The plaintiff, therefore, is not entitled to

[Tr. 1015; App. 1178]

recover merely by showing that the concerted activities of ASME and other alleged co-conspirators restrained interstate commerce in some degree. It must also show that there has been an unreasonable restraint.

Here, the conduct of which the plaintiff complains is that that restraint includes ASME's response to a letter of inquiry concerning a provision of the ASME Code. In determining whether or not an unreasonable restraint exists in this case, you must decide whether the conduct of ASME in this

particular case intended or was unreasonably calculated to prejudice the public interest.

Now, as to the Section II violations, there are four essential elements the plaintiff has to establish to prove that there was a conspiracy to monopolize within the meaning of Section II of the Sherman Antitrust Act.

First, that there was a conspiracy among ASME and the alleged co-conspirators to monopolize an appreciable amount of identificable [sic] interstate or foreign commerce of the United States, which commerce plaintiff claims to be the boiler water level control industry.

Second, that is so, ASME and the alleged

[Tr. 1016; App. 1179]

co-conspirators entered into such conspiracy with the intent to monopolize that commerce.

Third, that one or more of the acts claimed by the plaintiff in its complaint was done; and was in furtherance of such conspiracy to monopolize.

And fourth, that the conspiracy was the proximate cause of damage to the business or property of the plaintiff, by causing it to lose sales on which it would have made a profit.

The plaintiff must establish, that is, prove, has the burden of proof, as I have defined it, that each participant intended to conspire one with the other. That is, that this defendant intended to conspire with at least one of the others I have mentioned.

There has to be some kind of intent to acquire power, to exclude competition. They have to have jointly agreed to carry out a plan or scheme to attain monopoly market power, in some part of interstate trade or commerce.

There has to be an effort to destroy or exclude competition in some part of interstate commerce. The offense requires proof of an attempt to monopolize power in a segment of interstate

[Tr. 1017; App. 1180]

commerce.

In this area, it is, of course, the low water boiler cutoff commerce that they are talking about, essentially, as I understand it.

In deciding the question whether ASME has entered into a conspiracy to monopolize, the word "intent" means more than merely an intention to engage in some act. It means that the plaintiff must prove that ASME intended to injure or destroy competition in this device or in this aspect of the trade. Any particular act that was engaged in by ASME would not be sufficient in and of itself on the issue of a conspiracy, unless you find that the act was done by reason of an intent to injure or destroy competition.

If you find that ASME in its practices was motivated solely by legitimate aims in this particular case we are talking about, and that there was no intent to injure or destroy competition in an appreciable part of interstate commerce, then you would find against the plaintiff on the question of conspiracy to monopolize.

But if you find that they've satisfied you by the burden of proof, as I've defined it, that there

[Tr. 1018; App. 1181]

were substantial acts done in furtherance of that intent, with the adverse effect on the plaintiff, that the plaintiff claims, then you would find in favor of the plaintiff on this second point.

Neither deliberate indifference, recklessness, grossly negligent or stupidity or insensitivity is a substitute for willful joining of the conspiracy. However, the indicia of such states of mind or lack of them may be considered by you in determining whether the defendant joined a conspiracy to assist in the violation of the antitrust laws.

You may also consider in this connection the action or failure to act, when the actions of individual staff or committee members came to wider attention within the defendant. Such subsequent action or failure to act might indicate that a conspiracy had been joined earlier or was being joined when the information became generally known within the

organization and action was or was not taken. Mere coverup to avoid embarrassment would not consitute [sic] joining of a conspiracy, but you may use it as evidence, if, in your opinion, it assists you. There must be an intention to join others to violate the antitrust laws.

[Tr. 1019; App. 1182]

If McDonnell & Miller was violating the antitrust laws and this was known to defendant and it acted deliberately and intentionally to assist M&M in such a violation, it would be guilty of the violation with McDonnell & Miller.

Now, interstate commerce is what is involved in—is what the Sherman Antitrust Act is directed to, but as I understand it, there is no contention here that there is no interstate commerce. So, I won't describe definition of interstate commerce to you. But to restrain interstate trade and commerce means to interfere unreasonably with the ordinary, usual, and freely competitive pricing or distribution system of the open market in that trade. If you find that interstate commerce was unreasonably restrained, the amount of degree of that restraint is not significant.

I have used the term "monopolization". It is a species of restraint of trade. The term does not necessarily mean complete acquisition or control of the market in a particular commodity or the exclusion of all competition. The size of a corporation or the percentage of the market it controls are not by themselves indicative of a

[Tr. 1020; App. 1183]

violation of the antitrust laws.

However, these factors can indicate the degree of power which a corporation has in the competitive market. They can indicate the ability to exercise such power within the relevant market. If there is power to control or dominate such market, to exclude actual or potential competitors therefrom, or to otherwise unreasonably suppress competition in that market, this is sufficient to constitute monopolization under the antitrust laws.

Now, if you determine that ASME was a member of this conspiracy, if there was one, you must determine whether the plaintiff was injured in its business or property by reason of that conspiracy. As I have told you, at this stage, we are not concerned with how much, as long as it was a substantial injury.

There has to be actual economic injury as a result of the conspiracy. Unless there is such injury and ASME was a member of the conspiracy, there cannot be any liability by this defendant.

[Tr. 1021; App. 1184]

THE COURT: (continuing) The plaintiff has the burden of establishing such injury. You must find that there exists a causal connection between the alleged conspiracy and economic injury suffered by plaintiff sufficient for you to conclude that the conspiracy was a material cause or a substantial factor in the occurrence of the economic injury. The mere coincidence of declining business or other economic injury and an activity in violation of the antitrust laws is not sufficient to find a defendant liable, where the other factors, economic recession or general decline in the industry or business problems caused that injury.

In sum, you must find in favor of ASME unless you conclude that the plaintiff has shown not only that there existed a conspiracy in violation of the antitrust laws and that ASME was a member of it, but that the plaintiff has shown that the conspiracy was the actual and substantial cause of injury to the plaintiff. It need not be the only cause or the cause more substantial than any other cause but it has to independently be a substantial cause.

Now, you are going to have to consider

[Tr. 1022; App. 1185]

credibility of witnesses, both those that appeared before you and those who appeared in these depositions. The depositions, as you know by now, are taken with counsel from both sides present. The witness is sworn and there is a reporter like this one taking it all down but there is no judge present,

and you have to consider all of this testimony in the circumstances underwhich each witness has testified and all of the matters which indicate whether he is worthy of belief or not.

Consider the witness' intelligence, motive, state of mind, demeanor and manner as you observed it if there was an appearance here in court. Consider the relation each witness may bear to either side in the case, the manner in which he might be affected by the verdict and the extent to which he has been supported or contradicted by other evidence in the case. The deposition testimony is to be given weight, obviously, by you just as any other evidence in the case should be given weight by you.

There has been some discussion during the trial about an article published in the Wall Street Journal several years after some of the events in the

[Tr. 1023; App. 1186]

case occurred. I have also already instructed you on the point. You are not to read the article itself although apparently there are several copies in the exhibits. If you come across a reproduction which is readable and I don't know whether they are or not, just ignore it and go on to the next page. I have allowed reference to the article for only a limited purpose, only as it relates to the people's reactions to it after it was published. The reaction of a person may show something about how the person feels, and therefore what he or she did on an earlier occasion, but you should consider that reaction to the article in the light of the other evidence that is before you. People could be upset about what is in the newspaper, even though they did not do what the newspaper said they did. In fact, people may be more upset at a false story than at a true story, but you have to consider what you saw and heard here. What is actually said in that article is not relevant on the question of what actually happened, except insofar as I have indicated it explains the reactions of the people here.

The fact that a newspaper says something happened has no bearing or relevance on whether it

[Tr. 1024; App. 1187]

actually happened. There are things in papers that are completely wrong. There are things that are right, but it would be unfair for you to rely on a newspaper article in deciding facts in this case because the author of that article was not here under oath, subject to cross-examination and therefore, her credibility is not of any significance to you. You are the only ones that should decide the case on the evidence actually before you.

There are also some references to exhibits before a hearing in the Senate. I, myself, am not clear from what I have heard about what happened in the Senate but it doesn't make any difference. That again, like the article, has no bearing on the facts before you and do not speculate on what may have been going on in Washington or may not have been going on in Washington.

You have heard some questions about the propriety of actions of John James in suggesting language to be included in the June 9, 1972 letter. You are not here to decide whether Mr. James' actions were personally ethical as far as he was concerned. You are here to decide the question of whether ASME participated in a conspiracy to harm plaintiff's

[Tr. 1025; App. 1188]

business. That is the issue. Forget about why they are not here.

There was reference to the Bonner deposition. Any opinion expressed in Mr. Bonner's deposition as to the validity of this lawsuit or the liability of ASME should be given no weight at all by you. The decision as to liability is solely based on your determination and no one else's. Is that clear? Nobody is interested in what he thought about the suit. He did not know what you know. You are the only people who know all of this. You have to decide this on what is in evidence, not on what other people thought.

The opinions of Mr. Bonner were admitted solely on the issue of what people in the field in this trade might have thought about these letters in interpreting them. You,

however, should use your common sense in weighing the significance of these letters even though you do not have the technical experience and background that other people in the field may have had.

You are the sole triers of the facts in this case. It is your determination and interpretation of the evidence which is controlling. The case so

[Tr. 1026; App. 1189]

far as I can see has been extremely well tried by able and ethical counsel on both sides. They have presented their sides forcibly and well, but the decision is yours alone.

Now, if you find that anybody on the witness stand lied or in the deposition lied, you can ignore their testimony. You should evaluate the expert's testimony the same way as anybody else's. An expert is entitled to give opinions but essentially you are going to have to decide the credibility and weight of the expert's testimony based on qualifications, of course, and experience and interest, but on what you heard and on your common sense evaluation you find the opinion of the expert does not accord with your common sense evaluation in light of your experience, you are entitled to ignore the opinion completely.

Destruction or concealment of relevant documents is evidence which may tend to prove consciousness of guilt and should be considered and weighed by you in connection with all the other evidence, but again, it may not be any evidence of guilt of this defendant, and it is this defendant that we are concerned with here.

[Tr. 1027; App. 1190]

The weight depends upon the motive, as you know. Evaluate it and the surrounding facts and circumstances. If you don't remember any of the testimony and you want it read you can send in a note through the Marshal and I will have the reporter try to obtain it for you. It may take some time.

If you have any question about the applicable law, I will try to help you if I can. Send in a note. Don't discuss the case with anyone outside the jury room. If you have to

communicate you will do it only through the Marshal. Each of you is entitled to your own opinions. I have observed you. You are all intelligent and mature people. You should consider each other's opinions carefully. Listen to each other and then don't hesitate to change your opinion if you are convinced that you are wrong.

Your verdict has to be unanimous; is that clear? The verdict will either be liability or no liability.

Now, as to the two alternates, if there is no objection I am going to excuse them.

MR. WILLIAMSON: No objection.

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[Tr. 1028; App. 1191]

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Now, would counsel like to see me at the sidebar?

(sidebar discussion)

THE COURT: Yes? Plaintiff?

MR. WILLIAMSON: No. The only thing is I saw what you did, that you came back to the point on the credibility of witnesses. So far as I'm concerned

[Tr. 1029, App. 1192]

you covered it.

THE COURT: Yes.

MR. STANTION: Satisfactory to us, your Honor with the exception that we have asked your Honor to charge in the language of Court Exhibit 20 and you have declined to do so.

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Introduced in the
United States District Court
For the Eastern District of New York

[CX 9*]

PLAINTIFF'S REQUESTED JURY CHARGE NO. 28

A corporation, although an artificial being, existing only in contemplation of law, is held to the same measure of liability as an individual and is entitled to the same rights or protection. A corporation acts through its officers, directors and agents and, as such, may conspire with other corporations or with other individuals, as well as individuals may conspire with one another, they may conspire with any other corporation.

A corporation itself, cannot attend a meeting or make decisions; it must act through agents, such as its officers, directors and employees.

In order for a corporation to be responsible for the acts or statements of one of its agents it is not necessary that the corporation specifically authorize the agent to commit the act or make the statement. A corporation is legally bound by the acts and statements of its agents done or made in the name of the corporation and within the scope of their employment, agency or their apparent authority. Acts within the scope of employment are acts done on behalf of a corporation and directly resulted in the performance of the type of duties the employee has general authority to perform.

Apparent authority is the authority which outsiders could reasonably assume that the agent would have, judging from his position with the corporation, the responsibilities previously entrusted to him, and the circumstances surrounding his past conduct.

[* "CX" refers to a Court Exhibit in the trial court.]

Introduced in the
United States District Court
for the Eastern District of New York

[CX 14; AX V. 119-21*]

ASME REQUEST TO CHARGE NO. 4

Liability of ASME for Acts of Its Members

Hydrolevel and ASME in these actions are corporations and can act only by their officers, agents, servants or employees. Therefore, whenever mention is made of Hydrolevel and ASME doing or not doing anything, then of course it means the corporation or any of its officers, agents, servants or employees, acting within the scope of their employment or authority and on behalf of and for the benefit of the corporation.

In order for a corporation to be held responsible for the acts or statements of an agent, it is not necessary that the corporation specifically authorize the agent to commit such acts or make such statements. A corporation is legally bound by the acts and statements done or made within the scope of their express or apparent authority. By express authority is meant that type of authority specifically given to an agent by his superior. By apparent authority is meant that type of authority which outsiders would normally and naturally assume that the agent would have, in light of his position with the company and the circumstances surrounding his past conduct while with the company.

A corporation such as ASME is in law a person, but of course it cannot act otherwise than through its officers and agents. The law, therefore, holds corporations responsible for the unlawful acts of its officers, but only when such unlawful

[* "AX V." refers to the ASME Exhibit Volume submitted to the Court of Appeals, in which the exhibit is reproduced at the pages indicated.]

acts were performed within the scope of the authority of such officers and on behalf of and for the benefit of the corporation. This means that, unless you find that James and the others were acting with an intent to benefit ASME, or that ASME actually benefited from the letters that plaintiff has alleged establish a conspiracy, you cannot find that ASME participated in a conspiracy under the antitrust laws.

Where there is a conflict of interest between the officer or agent and the corporation, the corporation is not liable for the misconduct of the agent. This means that if you find that James and Hardin, although members of ASME committees, were motivated by the desire to benefit M&M, or that this desire to help M&M competitively was in conflict with the interests and purpose of the ASME, then you may not find that ASME has participated in a conspiracy in violation of the antitrust laws.

This rule is based on common sense. If a corporation receives the benefit of the misconduct charged, it is just that the corporation be held responsible for the consequences of that misconduct. On the other hand, the corporation should not be liable where the agents' conduct was undertaken to advance the interests of parties other than the corporation. The motive of the agent must be logically attributable to the corporation. If the officers or agents acted on behalf of interests adverse to the corporation or acted for their own economic benefit or the benefit of another corporation, their misconduct cannot be considered that of the corporation with which they are associated.

The evidence must show that the corporation profited from the officers' or agents' conduct or that the agents were authorized by the corporation to undertake such actions. Otherwise, the corporation cannot be held responsible for the misconduct of the agents.

Introduced in the
United States District Court
for the Eastern District of New York

[PX 38; AX V. 1*]

McDonnell & Miller Inc.

Doing One Thing Well

• • •

3500 North Spaulding Avenue
CHICAGO, ILLINOIS 60618

• • •

April 12, 1971

Mr. W. B. Hoyt, Secretary
ASME Boiler and Pressure Vessel Committee
345 East 47th Street
New York, New York 10017

Subject: Par. HG-605
Section IV Heating Boilers Code

Dear Mr. Hoyt:

Par. HG-605 of Section IV states that each automatically fired steam or vapor-system boiler shall have an automatic low-water fuel cut-off so located as to automatically cut off the fuel supply when the surface of the water falls, to the lowest visible part of the water-gauge glass. Is it the intent of this statement that the cut-off operate immediately when the boiler water level falls to the lowest visible part of the water-gauge glass, or is it permissible to incorporate a time-delay feature in the cut-off so that it will operate after the boiler water level reaches some point below the visible range of the gauge glass?

Very truly yours,

McDONNELL & MILLER, INC.

s/Gene Mitchell
Gene Mitchell

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[* Citations in brackets indicate where the original of an exhibit may be found. "PX" refers to a plaintiff's exhibit in the trial court; "AX V." refers to the ASME Exhibit Volume submitted to the Court of Appeals, where the exhibit is reproduced at the pages indicated. Similarly, "DX" refers to a defendant's trial exhibit and "HX V." to the Hydrolevel Exhibit Volumes in the Court of Appeals.]

Introduced in the
United States District Court
for the Eastern District of New York

[PX 18C at Exh. 5; AX V. 7]

[Stamped:
ASME
Apr. 29, 1971
Boiler Code]

Address Writer Care Of:
Engineering Department
The Hartford Steam Boiler
Inspection and Insurance Company
56 Prospect Street
Hartford, Connecticut 06102

• • •

Subject:

Date:
April 27, 1971

Inquiry from McDonnell & Miller, Inc.
Dated April 12, 1971

Mr. W. B. Hoyt, Secretary
ASME Boiler and Pressure Vessel Committee
345 E. 47th Street
New York, N. Y. 10017

Dear Mr. Hoyt:

I would propose an unofficial reply to the inquirer worded about as follows:

> A low-water fuel cut-off is considered strictly as a safety device and not as some kind of an operating control. Assuming that the water gauge glass is located in accordance with the requirements of Par. HG-602(b), it is the intent of Par. HG-605(a) that the low-water fuel cut-off operate immediately and positively when the boiler water level falls to the lowest visible part of the water gauge glass.
>
> There are many and varied designs of heating boilers. If a time delay feature were incorporated in a low-water fuel cut-off, there would be no positive assurance that the boiler water level would not fall to a dangerous point during a time delay period.

Yours very truly,

s/T. R. Hardin
T. R. Hardin
TRH/hw

[Stamped: ITT No. 002683]

cc: Mr. J. M. Guy
Mr. L. P. Zick

Introduced in the
United States District Court
for the Eastern District of New York

[PX 39; AX V. 10]

The American Society of Mechanical Engineers
United Engineering Center/345 E. 47th St., New York, N.Y.

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THE BOILER AND PRESSURE
VESSEL COMMITTEE

April 29, 1971

•••

Mr. Gene Mitchell
McDonnell & Miller, Inc.
3500 North Spaulding Avenue
Chicago, Illinois 60618

Subject: Section IV Heating Boilers Code - Par. HG-605

Dear Mr. Mitchell:

The inquiry contained in your letter of April 12, 1971, was referred to the Chairman of the concerned Subcommittee who offers the following advice:

A low-water fuel cut-off is considered strictly as a safety device and not as some kind of an operating control. Assuming that the water gage glass is located in accordance with the requirements of Par. HG-602(b), it is the intent of Par. HG-605(a) that the low-water fuel cut-off operate immediately and positively when the boiler water level falls to the lowest visible part of the water gage glass.

There are many and varied designs of heating boilers. If a time delay feature were incorporated in a low-water fuel cut-off, there would be no positive assurance that the boiler water level would not fall to a dangerous point during a time delay period.

Very truly yours,

s/ W.B. Hoyt
W.B. Hoyt
Secretary

•••

Introduced in the
United States District Court
for the Eastern District of New York
[PX 40; AX V. 21; HX V. 754]

Safgard

• • •

HYDROLEVEL CORPORATION
153 Verdi Street,
Farmingdale, New York

• • •

January 25, 1972

Mr. W. B. Hoyt, Secretary The Boiler and Pressure Vessel Committee
The American Society of Mechanical Engineers
United Engineering Center
345 E. 47th St.
New York, NY 10017

Dear Mr. Hoyt:

During a telephone conversation today with Mr. Earl Nobles of Pennco Industries, Inc., he read me a letter under your signature which infers that a time delay in a low water cut-off is unacceptable under the Boiler & Pressure Vessel Code. I was not aware of any such restriction or limitation.

The letter Mr. Noble [sic] made reference to was dated April 29th, 1971, and as it deals with a subject in the public domain, I am certain you will have no objection to furnishing me a copy. As you know we manufacture a product with a time delay, and if it is in conflict with any ASME Boiler & Pressure Vessel Code or Regulation we would be most interested in receiving such information.

Sincerely,

s/ DOMINICK DeLEONARDIS
Dominick DeLeonardis
Vice President

• • •

Introduced in the
United States District Court
for the Eastern District of New York

[PX 41; AX V. 22]

The American Society of Mechanical Engineers
United Engineering Center/345 E. 47th St., New York, N.Y.

February 8, 1972

THE BOILER AND PRESSURE
VESSEL COMMITTEE
• • •

Hydrolevel Corporation
153 Verdi Street
Farmingdale, New York 11735

Attention: Mr. Dominick De Leonardis
Vice President

Subject: Section IV, Heating Boilers, ASME Code—
Par HG-605

Dear Mr. De Leonardis:

As you requested in your letter of January 25, 1972, I am showing below, the April 29, 1971 reply of Mr. Hoyt to an inquirer on time delays of low water cut offs.

> "A low water fuel cut-off is considered strictly as a safety device and not as some kind of an operating control. Assuming that the water gage glass is located in accordance with the requirements of Par. HG-602(b), it is the intent of Par. HG-605(a) that the low water fuel cut-off operate immediately and positively when the boiler water level falls to the lowest visible part of the water gage glass.
>
> "There are many and varied designs of heating boilers. If a time delay feature were incorporated in a low water

fuel cut-off, there would be no positive assurance that the boiler water level would not fall to a dangerous point during a time delay period."

I hope this helps clarify the intent of the subject paragraph.

Very truly yours,

s/ R. D. SUTTON
R. D. Sutton
Assistant Secretary

RDS/sf

Introduced in the
United States District Court
for the Eastern District of New York

[No Exhibit number ... admitted into evidence between PX 41 and 42 at Tr. 64-65 (App. 216-17); AX V. 29-37; HX V. 756-64]

Safgard

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HYDROLEVEL CORPORATION
153 Verdi Street,
Farmingdale, New York

•••

March 23, 1972

Mr. W. B. Hoyt, Secretary
The Boiler & Pressure Vessel Committee
The American Society of Mechanical Engineers
United Engineering Center
345 East 47th Street
New York, NY 10017

RE: ASME Boiler and Pressure Vessel Code;
Heating Boilers; Section IV

Dear Mr. Hoyt:

You will recall that in our letter of January 25, 1972 to you, we asked that you send us a copy of an ASME letter of April 29, 1971 expressing a critical view towards time delays on low water fuel cut-offs. You apparently have chosen to reply through Mr. R. D. Sutton, Assistant Secretary of ASME, for we now have his reply of February 8, 1972. Mr. Sutton failed to send us ASME's letter of April 29, 1971. Instead, he quoted what is obviously only a limited portion of it.

Your and Mr. Sutton's casual and cavalier response to our request of January 25, 1972 is not satisfactory, and I think it appropriate that I emphasize and outline to you in detail our concern about this matter and the conduct of ASME.

For some time we have received reports from various in-

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dustry sources to the effect that ASME was seeking to discourage the use of any low water fuel cut-off having a time delay or snubber action, and that to this end, ASME had expressed the view that such cut-offs were unacceptable under the ASME Boiler and Pressure Vessel Code. We were unable to confirm these reports until early this year, when a representative of Pennco Industries called our attention to your letter of April 29, 1971. Pennco did not feel at liberty to supply us with a copy of your letter, and it was for that reason that we asked you for a copy by our letter of January 25, 1972.

At the time we wrote our letter of January 25, 1972, we were under the impression that your April 29, 1971 letter was addressed to Pennco. We have now learned that that was not the case, and that instead, your letter was apparently intended as a reply to an earlier letter of April 12, 1971 from an unidentified inquirer. We do not know how Pennco came into possession of your letter of April 29th, nor how many other persons have been furnished with the letter, but we do understand that reproduced copies of the letter have been distributed to various potential users of such cut-offs.

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[3]

I must tell you that we view ASME's distribution of your letter of April 29th with great concern for a number of reasons. The first is that your letter is so worded as to indicate that it is the official view of ASME on low water cut-offs with time delays. Certainly, that is the way the industry has construed the letter. That is hardly a surprising construction in view of the fact that the portion of your letter quoted in Mr. Sutton's letter of February 8th, was, we

are informed, stated to be the "opinion" of the Chairman of the Subcommittee for Heating Boilers, Section IV.

The second reason is that your letter ignores and violates ASME's own Code and Rules. Thus, subparagraph HG-602(b) of the ASME Boiler and Pressure Vessel Code (Section IV-Heating Boilers), places the responsibility for establishing the safe operating level of the water line in a steam boiler on the boiler manufacturer, and provides in part that:

> "The lowest visible part of the water gage glass shall be at least 1" above the lowest permissible water level recommended by the boiler manufacturer. With the boiler operating at this lowest permissible water level there shall be no danger of overheating any part of the boiler."

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In turn, subparagraph HG-605(a) of this Code also leaves the location of the low water fuel cut-off device to the discretion and responsibility of the boiler manufacturer, within the limits of subparagraph HG-602(b), providing in part as follows:

> "Each automatically fired steam or vapor system shall have an automatic low water fuel cut-off so located as to automatically cut off the fuel supply when the surface of the water falls to the lowest visible part of the water gage glass."

Finally, nowhere does the Code rule out low water cut-offs having time delays. On the contrary, Subparagraph HG-640(b) of the Code only directs that the manufacturer equip his boilers "with suitable primary (flame safeguard) safety controls, safety limit switches, and burners or electric elements, as required by a nationally recognized standard."

Under these quoted portions of the Code it would be the responsibility of the boiler manufacturer desiring to use a low water fuel cut-off having a time delay to establish such a water level and so to locate the cut-off as to assure compliance with the Code. And if he so placed a low water cut-off having a time delay, the only requirement of the Code is

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that the cut-off conform to a nationally recognized standard. Yet, the clear import of your April 29th letter is that no matter what water level the manufacturer established, and no matter where the cut-off is located, the manufacturer using a time delay cannot comply with the Code! Your letter states:

> "There are many and varied designs of heating boilers. If a time delay feature were incorporated in a low water fuel cut-off, there would be no positive assurance that the boiler water level would not fall to a dangerous point during a time delay period." (Underlining added)

Not only is there no support in the Code for this criticism of time delay low water cut-off expressed in your letter of April 29th, but in expressing that criticism and permitting its circulation as an official position of ASME, you seek, by fiat, to amend the Code. I am sure that the Code, based on the experience and wisdom of many persons, past and present, cannot be so easily amended.

But you do more than merely seek to amend the Code by your letter. You advance a partisan position and thereby ignore the traditional rule of ASME as an impartial developer of safety standards. I would remind you of the fourth paragraph of the Foreward to the Code:

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> "The rules established by the Committee are not to be interpreted as approving, recommending, or endorsing any proprietary or specific design or as limiting in any way the manufacturing freedom to choose any method of design or any form of construction that conforms to Code rules."

My final reason for concern is that the position expressed in your April 29th letter is contrary to the established safety record of low water cut-offs having time delay features. Our company has manufactured and distributed a low water cut-off featuring a time delay for several years, and to this date we are aware of no failures of either our low water cut-offs or boilers on which they have been installed.

Consistent with subparagraph HG-640(b) of the Code, our cut-off with a time delay has been investigated by Underwriters' Laboratory ("UL") which has given its complete approval to it in accordance with UL Standard No. 353. In addition, our same cut-off with a time delay has been approved by Factory Mutual Research Corporation ("FM"), and it is consistent with the requirements of the National Fire Protection Association provisions relating to an interlock system, Sec. 5625 of which provides that "interlock devices shall include

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proper snubbers, time delays, or other means to provide control action consistent with the purposes of this Standard unit causing unnecessary shut-down:" (Underlining added)

Indeed, our control cannot be unknown to the ASME, for ASME's own publications have long carried diagrams of our low water cut-offs, including those having time delays. As evidence of this, I am enclosing a photocopy of our Bulletin 101b, No. 867 Series showing our models LCAF 867, LC 867 TD, and LC 867 E. I think you will agree that the diagrams contained on page 24 of ASME's Recommended Rules for the Care and Operation of Heating Boilers, 1970, Sec. VI, are in fact diagrams for our Safgard cut-offs. Figure 16, depicting an "electrical probe type low water control" clearly is our Safgard control as reflected in the enclosed Bulletin 101b, and the related diagrams clearly are diagrams of our controls from which ASME has eliminated the descriptive numbers. Notwithstanding that you have eliminated the descriptive numbers, it is perfectly apparent that ASME has long recognized controls having time delays.

In short, time delays are nothing new, and they are recognized and approved by responsible rating agencies and they

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have been and are being used by reputable boiler manufacturers. In view of this, I am sure that you can understand our distress at ASME's sudden and cavalier expression that

time delay features incorporated in a low water safety cut-off are not acceptable.

Already your letter has had a serious adverse effect on our company. I do not know that the damage you have done us can be repaired. But, before we consider other action, we believe it appropriate that ASME to be given an opportunity to endeavor to undo that damage. As a minimum, we ask that you now send to all persons who may have received your letter of April 29th, directly or indirectly, a statement correcting the position advanced in that letter. Such a statement, we believe, should make it very clear that low water cut-offs having time delay features are indeed acceptable under the Code. If you have any doubts as to what persons may be gotten access to the indiscriminate dissemination of your letter, then I see no choice but for you to circulate a correcting statement generally among all who might reasonably have become privy to your letter.

Because of the seriousness with which we view this mat-

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ter, I am sending a copy of this letter, as well as copies of our letter of January 25, 1972 to you, Mr. Sutton's unresponsive reply of February 8, 1972, and the other materials enclosed with this letter, to each member of the ASME Subcommittee having jurisdiction over the Code, and to each member of the Boiler and Pressure Vessel Committee.

I trust that in due course I will hear from you with a view towards remedying the damage that has been done by ASME. In any event, I want you to know that Hydrolevel Corporation views this matter with concern and outrage, and is determined to take all necessary steps in order to vindicate our rights.

Very truly yours,

HYDROLEVEL CORPORATION

By s/ RUSSELL S. RYMER
President

cc: Subcommittee Members
Committee Members

Introduced in the
United States District Court
for the Eastern District of New York
[PX 16B at Exh. 25; AX V. 38-39]

The American Society of Mechanical Engineers

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THE BOILER AND PRESSURE
VESSEL COMMITTEE

March 27, 1972

•••

Hydrolevel Corporation
153 Verdi Street
Farmingdale, New York 11735

Attention: The President
Subject: Section IV Par. HG-605

Dear Sir:

Your letter of March 23, 1972 has been received.

I must take strong exception to your intemperate statement that our response of February 8, 1972 to Mr. DeLeonardis inquiry of January 25, 1972 was "casual and cavalier". Furthermore our reply, over Mr. Sutton's signature, contained the entire pertenent [sic] part of our letter of April 29, 1971 which was requested by Mr. DeLeonardis. A copy of that letter is appended hereto with the addressed company name deleted since that does not concern you.

Your letter will be brought to the attention of the concerned subcommittee.

Very truly yours,

W.B. Hoyt
Secretary

/drp

bcc: All members of the Main Committee

attachment: •••
Letter 4-29-71 from Mr. Hoyt

April 29, 1971

Subject: Section IV Heating Boilers Code - Par. HG-605

The inquiry contained in your letter of April 12, 1971, was referred to the Chairman of the concerned Subcommittee who offers the following advice:

A low-water fuel cut-off is considered strictly as a safety device and not as some kind of an operating control. Assuming that the water gauge glass is located in accordance with the requirements of Par. HG-602(b), it is the intent of Par. HG-605(a) that the low-water fuel cut-off operate immediately and positively when the boiler water level falls to the lowest visible part of the water gauge glass.

There are many and varied designs of heating boilers. If a time delay feature were incorporated in a low-water fuel cut-off, there would be no positive assurance that the boiler water level would not fall to a dangerous point during a time delay period.

Very truly yours,

s/ W. B. Hoyt
W. B. Hoyt
Secretary

Introduced in the
United States District Court
for the Eastern District of New York

[DX Y-2; AX V. 40-41]

Subcommittee on Heating Boilers Meeting

May 4, 1972

Name	Affiliation	Category of Interest	Category of Interest re. LWCO
J. W. James, Vice Chairman	McDonnell & Miller Inc.	Mfg. of Mtl. or Acc.	Manufacturer
E. D. Dow, Secretary	The Hartford Steam Boiler	Insurance & Inspection	Insurance & Inspection
M. J. Telesmanic	Commerical Union	Insurance & Inspection	Insurance & Inspection
J. E. Vaughan	General Services Administration	User	User
J. F. Johnston	Johnston Brothers Inc.	Manufacturer	User
G. E. Fratcher	A.O. Smith Corp.	Manufacturer	User
S. F. Harrison	National Board	Regulatory	Regulatory
G. B. Sims, Jr.	United States Coast Guard	Regulatory	Regulatory
R. H. Weigel	Burnham Corp.	Manufacturer	User
J. R. Thomson	Bock Corp.	Manufacturer	User
C. W. Allison	State of Tennessee	Regulatory	Regulatory
T. H. Milton	Heat Timer Corp.	Manufacturer	User
T. J. Corbett	Avco Spencer Div.	Manufacturer	User
R. J. Sharp	Windsor Heating Co.	Manufacturer	User

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[2]

Conference Committee	Affiliation	Location
R. Beckwith	State of Michigan	Lansing, Michigan
J. T. Edson	San Francisco	San Francisco, CA
J. W. Emerson	State of Maine	Augusta, Maine
J. F. Hanley	City of Chicago	Chicago, IL
G. M. Kuetemeyer	City of Milwaukee	Milwaukee, WI
O. R. Kyle	City of Memphis	Memphis, TN
O. W. Lillis	City of Los Angeles	Los Angeles, CA
J. K. Mahr	State of Colorado	Denver, Colorado
H. G. Parker	State of Texas	Austin, Texas
R. E. Peterson	State of Hawaii	Honolulu, Hawaii
S. Schugar	City of Detroit	Detroit, MI
C. C. Shriver	Kansas State	Topeka, Kansas
S. Smith	British Columbia,	Vancouver, BC

Conference Committee	Affiliation	Location
L. E. Stoppleman	City of St. Louis	St. Louis, MO
S. B. Voris	City of Seattle	Seattle, WA
H. B. Wilson	City of Phoenix	Phoenix, AZ

Guests	Affiliation	Location
C. Anderson	Superior Boiler	Hutchinson, Kansas
J. D. Andrew	Uniform Boiler	Hartford, CT
L. Baird	State of Minnesota	St. Cloud, Minnesota
H. Bluhm	State of Minnesota	Cambridge, Minnesota
M. P. Bragg	Hartford Steam Boiler	Hartford, CT
H. M. Canavan	Factory Mutual Research Co.	Norwood, MA
W. Clark	State of Tennessee	Chattanooga, TN
G. Cook	Hartford Steam Boiler	Minneapolis, MN
W. F. DeWolfe	Province of N.B.	Fiton, NB Canada
A. Duncan	A.O. Smith	Kankakee, IL
K. Fields	State of Michigan	Lansing, MI
C. Gramstad	Hartford Steam Boiler	Cleveland, OH
L. R. Happ	Trane Company	LaCrosse, WI
J. B. Kensey	Trane Co.	LaCrosse, WI
W. H. Lauridson	Vapor Corp.	Chicago, IL
H. Long	Hartford Steam Boiler	Minneapolis, MN
F. Ludwig	Western National	Minneapolis, MN
D. Lyon	Air Force	Anchorage, AK
L. Mackedanz	State of Minneapolis	Minneapolis, MN
S. W. May	Industrial Boiler Co.	Thomasville, GA
R. Ostrem	Wisconsin	Madison, WI
R. C. Paridy	Hartford Steam Boiler	Philadelphia, PA
J. Parrir	State of Tennessee	Chattagnooga, TN
C. M. Pickett	Hartford Steam Boiler	Baltimore, MD
J. W. Platt	McDonnell & Miller	Chicago, IL
J. R. Reed	Hartford Steam Boiler	Minneapolis, MN
H. E. Schmidtke	Hartford Steam Boiler	Minneapolis, MN
A. H. Schultz	State of Minneapolis Boiler Div.	Minneapolis, MN
B. Searles	Union Carbide Nuclear Div.	Oak Ridge, TN
B. G. Stunkam	Hartford Steam Boiler	Minneapolis, MN
F. X. White	Insurance Services Office	New York, NY
S. E. White	Hartford Steam Boiler	Chicago, IL
J. Woodworth	Hydronics Institute	Berkeley Heights, NJ
L. W. Yoder	Babcock & Wilcox	Barberton, OH

Introduced in the
United States District Court
for the Eastern District of New York

[DX Y-1; AX V. 42-45]

ATTENDANCE

Boiler and Pressure Vessel Committee Meeting

May 5, 1972

Present: Main Committee	Affiliation	Category of Interest	Category of Interest re LWCO
L. P. Zick, Chairman	Chicago Bridge & Iron	Manufacturer	User
W. L. Harding, Vice Chairman	Combustion Engineering	Manufacturer	User
B. W. Bace	American Oil Corp.	User	User
R. J. Bosnak	U. S. Coast Guard	Regulatory	Regulatory
P. M. Brister	Babcock & Wilcox	Manufacturer	User
H. M. Canavan	Factory Mutual	Insp. & Ins.	Insp. & Ins.
R. J. Cepluch	Combustion Engineering	Manufacturer	User
J. S. Clarke	Esso Research & Engrg	User	User
W. E. Cooper	Teledyne Materials	General Interest	General Interest
W. D. Doty	U. S. Steel	Mfg. of Mtl. or Acc.	User
G. E. Fratcher	A. O. Smith Corp.	Manufacturer	User
G. B. Grable	Bechtel Corp.	General Interest	User
R. C. Griffin	Sun Oil Corp.	User	User
S. F. Harrison	The National Board	Regulatory	Regulatory
J. W. James	McDonnell & Miller Inc.	Mfg. of Mtl or Acc.	Manufacturer
E. M. Kloeblen	Union Carbide Corp.	User	User
B. F. Langer	Westinghouse	Manufacturer	User
J. R. MacKay	Dominion Bridge	Manufacturer	User
R. H. Moeller	Huntington Alloys	Mfg. of Mtl or Acc.	User
M. S. Nehls	C. F. Braun	General Interest	User
J. L. Sullivan	State of New Jersey	Regulatory	Regulatory
C. J. Veith	DuPont	User	User
F. S. G. Williams	Taylor Forge	Mfg. of Mtl. or Acc.	User
W. B. Hoyt	ASME	Staff	Staff
S. W. Reynolds	ASME	Staff	Staff
W. J. Woollacott	ASME	Staff	Staff

Present:

Conference Committee	Affiliation	Category of Interest	Category of Int re LWCO
C. W. Allison	State of Tennessee	Regulatory	Regulatory
R. V. Curry	Province of Saskatchewan	Regulatory	Regulatory
R. Beckwith	State of Michigan	Regulatory	Regulatory
A. J. R. Rees	Province of Alberta	Regulatory	Regulatory
E. Schoenfeld	American Bureau of Ships	Insp. & Rating	Insp. & Ratin
D. R. Bartosch	State of Oregon	Regulatory	Regulatory
W. F. DeWolfe	Province of New Brunswick	Regulatory	Regulatory
D. R. Gallup	State of Illinois	Regulatory	Regulatory
J. R. Hanley	City of Chicago	Regulatory	Regulatory
O. W. Lillis	City of Los Angeles	Regulatory	Regulatory
L. A. O'Morrow	Province of Manitoba	Regulatory	Regulatory
E. A. Peterman	Commonwealth of Pennsylvania	Regulatory	Regulatory
R. E. Peterson	State of Hawaii	Regulatory	Regulatory
S. Smith	Province of British Columbia	Regulatory	Regulatory
L. E. Stoppleman	State of Missouri	Regulatory	Regulatory
J. E. Williams	Province of Prince Edward Island	Regulatory	Regulatory
Director of Codes and Standards			
Melvin R. Green	ASME	Staff	Staff

Subcommittee Members

Present:

Subcommittee on Power Boilers	Affiliation	Category of Interest re LWCO
R. Beckwith	State of Michigan	Regulatory
B.F. Love	Combustion Engineering	User
W. H. Groundwater	Bechtel Corp.	User
J. F. Johnston	Johnston Brothers, Inc.	User
Subcommittee on Nuclear Power		
F. W. Catudal	Travelers Insurance Co.	Insurance & Inspection
L. J. Chockie	General Electric	User
W. R. Gall	Oak Ridge National Lab.	Research
H. F. Jackson	Oak Ridge National Lab.	Research
R. F. Reedy	Chicago Bridge & Iron	User
D. W. Sher	Combustion Engineering	User
W. R. Smith, Sr.	Bechtel Corp.	User
Subcommittee on Heating Boilers		
B. H. Clark	Union Carbide	User
Subcommittee on Pressure Vessels		
R. D. Bonner	Standards Oil Corp.	User
R. A. Ecoff, Jr.	Nooter Corp.	User
J. R. Farr	Babcock & Wilcox	User
J. H. Faupel	E. I. DuPont Corp.	User
R. M. Gibson	Factory Mutual Insurance	Insurance—Inspection
J. LeCoff	Catalytic Construction	User
W. R. Mikesell	Chicago Bridge & Iron	User
A. J. R. Rees	Province of Alberta	Regulatory
E. Schoenfeld	American Bureau of Ships	Inspection & Rating
J. J. Szigety	Foster Wheeler Corp.	User
Subcommittee on Code Symbol Stamps		
W. J. Stuber	Royal Globe Insurance Co.	Insurance & Inspection
Honorary		
J. D. Andrews, Jr.	Uniform Boiler & Pressure Vessel Laws Society	Regulatory
National Board		
D. R. Bartosch	State of Oregon	Regulatory
J. G. Gillissie	National Board Consultant	Regulatory
L. J. Hutchinson	National Board Consultant	Regulatory

F. R. Abernathy	Tennessee Eastman Co.	Kingsport, Tenn.
W. J. Beuler	Graham mfg. Company	Batavia, New York
J. O. Brown	C-E Natco	Tulsa, Okla.
D. Christofferson	Chicago Bridge & Iron	Oakbrook, Ill.
J. E. Dawson	Hercules Inc.	Wilmington, Del.
A. W. Diamond	Dept. of Labor	NFLD Canada
P. Dimitriff	AELL-Power Projects	Sheridan Park, Ontario
A. Duncan	A. O. Smith Corp.	Kankakee, Ill.
T. Duncan	Gaston County Dyeing	Charlotte, N.C.
J. F. Edson	City & County of S. F.	San Francisco, Calif.
J. R. Farr	Babcock & Wilcox	Barberton, Ohio
K. Field	State of Michigan	Lansing, Mich.
C. Gramstad	Hartford Insurance	Cleveland, Ohio
J. J. Hack	Hartford Steam Boiler	Hartford, Conn.
C. H. Harmsen	Northern States Power	Mick, Min.
J. E. Hartin	Continental Inspection	Toronto, Ontario
M. J. Houle	Trane Co.	LaCrosse, Wis.
J. J. Kane	Inspeccions y Peritajes	Mexico, D. F.
J. B. Kansey	Trane Co.	LaCrosse, Wis.
E. L. Kemmler	Hartford Steam Boiler	Hartford, Conn.
W. H. Lauridsen	Vapor Corp.	Chicago, Ill.
C. W. Lawton	C-E Natco	Windsor, Conn.
D. Lyon	U. S. Air Force	Anchorage, Ark.
T. J. Macaulay	Buckeye Fabricating Co.	Dayton, Ohio
J. K. Mahr	State of Colorado	Denver, Col.
R. E. Marowity	Brighton Corp.	Cincinnati, Ohio
R. J. Meyer	Nooter Corp.	St. Louis Mo.
L. P. Nicklep	3M Co.	St. Paul, Minn.
J. Nowak	Rheem-Acme Ind.	Jackson, Miss.
R. C. Paridy	Hartford Steam Boiler	Phila., Pa.
C. M. Pickett	Hartford Steam Boiler	Baltimore, Md.
J. W. Platt	McDonnell & Miller Inc.	Cleveland, Ohio
H. C. Rasmenpair	Struthers Wells	Warrior, Pa.
G. S. Reddy	John Blue Company	Huntsville, Ala.
V. Saliamonas	General Electric	San Jose, Calif.
H. E. Schmidt	Hartford Steam Boiler	Hartford, Conn.
N. G. Schreiner	Consultant	Phila., Pa.
S. Schugar	City of Detroit	Detroit, Mich.
E. W. Shilling	DuPont Co.	Wilmington, Del.
R. B. Smith, Jr.	Hercules Inc.	Wilmington, Del.
K. E. Stockton	C-E Natco	Tulsa, Okla.
W. H. Templeton	Continental Insurance	Toronto, Ontario
M. E. Thompson	Hartford Insurance	Cleveland, Ohio
J. R. Vasques	B & N Mexico	Mexico, D. F.
S. B. Voris	City of Seattle	Seattle, Washington
R. I. Walker	Hartford Steam Boiler	Minneapolis, Minn.
F. X. White	Insurance Service Office	New York, New York
C. M. Williamson	Will Flow Company	Belding, Mich.
H. B. Wilson	City of Phoenix	Phoenix, Arizona
L. Wood	Black Sivalls & Bryson	Tulsa, Okla.
L. Yoder	Babcock & Wilcox	Barberton, Ohio
P. R. Young	Rye Hanvon Spg.	Los Angeles, Calif.

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[PX 16B at Exh. 28; HX V. 264-65]

(Condensed abstract of taped discussion at M/C meeting May 5, 1972. [Handwritten at bottom of first typed page].)

Section IV Reply of Mr. T. R. Hardin
Hydrolevel Corp. Letter Dated March 23
Mr. J.W. James (speaker)

All members of the Main Committee received a copy of this letter with several enclosures. The intent of the letter was to criticize the response in an unofficial reply which was prepared by Mr. T. R. Hardin who has retired from his business and ASME Committee activity.

This matter was reviewed publicly and completely at the Heating Boiler Subcommittee Meeting yesterday afternoon with Mr. S. F. Harrison in the Chair. The committee after full discussion decided and voted unamimously to reconfirm Mr. Hardin's unofficial reply involving only the first paragraph. There were two paragraphs.

The intent of that action was to reconfirm the unofficial reply for the Main Committee to consider an official reply. The intent of Mr. Hardin letter [sic] was to emphasize and re-emphasize that any low water cut off device installed on a heating boiler would operate immediately and positively when the boiler water level falls to the lowest visible part of the water gauge glass.

The part that wasn't reconfirmed read this way:

There are many and vary [sic] designs of heating boilers. If a time delay feature were incorporated in a low water fuel cut-off there would be no positive assurance that the boiler water level would not fall to a dangerous point during a time delay period.

[2]

Mr. Hardin unofficially implied that a time delay might not be desirable. The action of the Heating Boiler Committee in the First Paragraph of Mr. Hardin's letter allows any device to be used in conjunction with a low water cut off with the understanding that it be positioned in such a way that when all the automatic features at function including a time delay that the burner would be cut off immediately and positively when the boiler water level falls to the lowest of part of the water gauge glass. [sic]

So what the Heating Boiler Subcommittee did yesterday was to say, you can use a time delay.

Zick: The answers are prepared by secretaries with the help of the of the [sic] Chairman and this reference of Mr. Hardin reply [sic] was actually a reply from our staff which is always the case.

It is the opinion of the Chairman that this committee should endorse the actions of Subcommittee IV if they see fit, since everyone received a copy, as an official reply.

"A low water fuel cut-off is considered strictly as a safety device and not as some kind of operating control. Assuming that the water gauge glass is located in accordance with the requirements of paragraph HG-602(b) it is the intent of paragraph HG-605(a) that the low water fuel cut-off operate immediately and positively when the water level falls to the lowest visible part of the water gauge glass.

Mr. R. J. Cepluch: "If I were the man receiving that I would read it as prohibiting my device. This device would not be prohibited under the Code, provided it was so located that it did shut the burner before it reached the lower level."

Voted: Messrs. Harrison and Dow will prepare letter to go into the minutes.

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[PX 45; AX V. 77]

The American Society of Mechanical Engineers
United Engineering Center/345 E. 47th St., New York, N.Y.

BOILER AND PRESSURE VESSEL COMMITTEE

June 9, 1972

Hydrolevel Corporation
153 Verdi Street
Farmingdale, N.Y. 11735

Attention: Mr. Russell S. Rymer, President

Subject: Section IV, Heating Boilers-Par HG-605
Your Letter of March 23, 1972

File: BC 72-99

Gentlemen:

As indicated in our letter of March 27, 1972, your letter of March 23, 1972 was considered by the applicable Committees at their meeting held on May 4 and 5, 1972.

The Committee confirmed the intent of our letter to the attention of Mr. D. DeLeonardis of February 8, 1972.

This will advise that there is no intent in Section IV to prohibit the use of low water fuel cutoffs having time delays in order to meet the requirements of Par. HG-605 (a). This paragraph relates itself to Par. HG-602 (b) which specifically delineates the location of the lowest visible part of the water gage glass.

If a means for retarding control action is incorporated in a low-water fuel cutoff, the termination of the retard function must operate to cutoff the fuel supply before the boiler water level falls below the visible part of the water gage glass.

Very truly yours,

W. B. Hoyt
Secretary

drp/

bcc: W. L. Harding
S. F. Harrison
J. W. James
L. P. Zick

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[PX 3, Exh. 1; HX V. 61-62]

CONFIDENTIAL

ITT

International Telephone
and Telegraph Corporation

McDonnell & Miller

3500 N. Spaulding Avenue
Chicago, Illinois 60618
(312) 267-1600

Date November 14, 1973

From: W. E. Brennan

To: R. R. Kubis

Subject: Recommendation on J. W. James

Attachments:

"Personal Record"

Recommendation:

That J. W. James be retained by McDonnell & Miller on site as a regular employee if possible, or on a contract basis otherwise. Details of salary and conditions to be negotiated. His basic work content to be similiar to his present, with these three primary duties listed in priority:

1. Maintain his status and influence in professional and code making bodies for the benefit of M & M, including handling product submittals to inspection bodies.

2. Provide technical support to all M & M functions where appropriate and provide direct back-up in the product liability area.

3. Perform the direct supervisory function in the customer correspondence section.

Reason for the recommendation:

John has been a senior management employee of M & M for over 25 years. His professional and academic credentials are outstanding. A major reason for the continued success at M & M is a result of his efforts and skill in influencing the various code making bodies to "legislate" in favor of M & M products. This has been a planned strategy for the business under E. N. McDonnell and carried out with considerable success as evidenced by the M & M market penetration of 70 plus %.

John has considerable professional stature in the controls field and is widely known both in the United States and in Europe. In addition to the impressive "personal record" attached, below are some of his current activities that should be emphasized:

ASME

1. Member of main boiler and pressure code committee.

2. Member of executive committee of the main committee.

3. Chairman of the heating boiler sub-committee (section 4).

4. Member of safety valve sub-committee.

American Society of Heating and Air Conditioning Engineers—presidential member (national president in 1956)

• • •

[2]

A detailed list of John's accomplishments at M & M has not been made, but I am sure it would be most impressive.

It is of vital importance to M & M to maintain the continuity of John's influence as above. He has a contribution to make and is both willing and able to make it. John is 67 year old, his health is excellent and his mental abilities show no deterioration. In this circumstance his seniority is a distinct plus for both experience and influence.

I need John W. James in the position discribed [sic] in the recommendation in order to continue the high level of financial performance of M & M and ask that you allow me to fulfill that need without delay. In addition to this direct need, if ITT fails to maintain John's present status in the various code activities, there is a risk of criticism of ITT from his associates. He is M & M to these people. John's integrity is not at question here. He would under no circumstance do anything to hurt M & M or ITT, in my opinion. However his unplanned or unannounced departure could result in unnecessary industry antagonism. Certainly at some future point a placement for John will be necessary, and was so recognized in the 1973 budget and 1974 business plan (an assistant was planned), but the action must be carefully planned and executed.

Attached are several copies of this letter for your use with Messrs. Stork, Berkshire, Wallisky, as you see fit.

WEB/bw

Introduced in the
United States District Court
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[PX 15 at Exh. 28, HX V. 182-84]

ITT

International Telephone and Telegraph Corporation

McDonnell & Miller

3500 N. Spaulding Ave.
Chicago, Illinois 60618
(312) 267-1600
Telex 25-3376

From: W. E. Brennan

To: E. C. Stork—FHD

Subject: Response to Wall Street Journal

Date June 12, 1974

Attached is a copy of John W. James' letter to Ms. Priscilla Meyer of the Wall Street Journal. This letter resulted from John's visit yesterday with Mr. P. O'Shea and others at New York Headquarters. It has been approved for release by both New York Legal and Public Relations Departments.

Our understanding at McDonnell & Miller is that we are to refer any inquiry from Ms. Meyer or the Wall Street Journal to Mr. Jes E. Schlaikjer in New York.

s/W.E. Brennan
W. E. Brennan

WEB/lp
Attachment
Copies to:

Midwest Legal	New York Headquarters	FHD	M & M
G. Athas	J. C. Clamp	R. J. Berkshire	J. W. James
H. McDonald	P. O'Shea	R. R. Kubis	J. W. Platt
	K. Perkins	E. L. Mitchell	
	J. E. Schlaikjer	J. Vokaty	

McDonnell & Miller
A Unit of International
Telephone and Telegraph
Corporation
3500 N. Spaulding Ave.
Chicago, Illinois 60618
(312) 267-1600
ITT Telex 25-3376

June 12, 1974

Ms. Priscilla Meyer
The Wall Street Journal
22 Cortlandt Street
New York, New York 10007

Dear Ms. Meyer:

I understand from Mr. W. B. Hoyt, Secretary of the ASME Boiler and Pressure Vessel Committee, that you have inquired concerning an interpretation given by Mr. Hardin, then Chairman of the ASME Subcommittee on Heating Boilers, concerning time delay features in a low water cut-off product. I understand that you have a complete file concerning this matter. I would like to point out the following:

1. Numerous requests for interpretation are received by the Committee weekly and such requests are entirely routine;

2. This request was handled in a routine manner and was answered by the Chairman of the Subcommittee;

3. After Hydrolevel complained about the interpretation, the interpretation was submitted to the entire Subcommittee at its May, 1972 meeting. I, as an employee of the only competitor of Hydrolevel, removed myself from the discussion. The Subcommittee is made up of 15 members and is composed of representatives from boiler manufacturers, users such as Illinois Bell Telephone, regulatory bodies such as the Chief Boiler Inspector for Tennessee, insurance companies, and government agencies such as GSA and U.S. Coast Guard.

This Subcommittee advising there was no intent to prohibit low water cut-offs having time delays reaffirmed the prior interpretation by Mr. Hardin, in stating, in a letter of June 9, 1972 by Mr. Hoyt, that "if a means for retarding control action is incorporated in a low water fuel cut-off, the termination of the retard function must operate to cut off the fuel supply before the boiler water level falls below the visible part of the water gauge glass".

***

[2]

4. The top level marketing people of McDonnell & Miller did, in fact, point out the fact to some OEM boiler customers that Hydrolevel's product might not meet the code requirements, depending upon application. We consider this to be fair and honest competition. In fact, if you read Hydrolevel's own literature, it criticizes our product and other float type products in some of their features. We consider pointing out the disadvantages of the competitor's product good and fair competition, particularly where safety features are involved.

5. As you apparently know, it is our understanding that you informed Mr. Hoyt that the FTC has investigated Hydrolevel's complaint and has closed the file on the basis that this dispute is between two companies and it does not involve any violation of the antitrust laws including, I assume, Section 5 of the Federal Trade Commission's Act which prohibits unfair competition.

If you have any further questions, will you please advise us in writing.

Very truly yours,

McDONNELL & MILLER ITT

s/JOHN W. JAMES

By JOHN W. JAMES

JWJ/lp
Attachment

Introduced in the
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[PX 5 at Exh. 8; HX V. 67-68]

COMMITTEE CORRESPONDENCE

Address Writer:

JOHN W. JAMES
2320 GREENWOOD AVE.
WILMETTE, ILLINOIS 60091

Date: August 9, 1974

Wall Street Journal Article
Dated July 9, 1974

Mr. M. R. Green, Managing Director
ASME Research, Codes and Standards
United Engineering Center
345 East 47th Street
New York, New York 10017

Dear Mr. Green:

In accordance with our telephone conversation earlier this week, I have prepared the following statement which may be excerpted for inclusion with the material you intend to present to the ASME Council.

Because the subject article insinuates "close ties between (a) dominate company in an industry and the professional society (ASME) that serves as its watchdog", it seems desirable to review the facts relative to ASME Boiler and Pressure Vessel Committee Procedure for handling routine inquiries.

There will be no attempt in this letter to respond to any of the commercial implications of the subject article many of which are not consistent with the facts.

Paragraph 8.02 in the ASME Committee Procedure outlines a process for handling routine inquiries. When the

April 12, 1971 inquiry from Mr. Gene Mitchell with McDonnell & Miller, Inc. was received, the Secretary of the Committee referred the matter to Mr. T. R. Hardin who was then Chairman of the Subcommittee on Heating Boilers.

There was inference in the Wall Street Journal article that Mr. Mitchell could have obtained an official answer from me instead of writing ASME. This is not true. As a matter of fact, many inquiries sent to the Secretary are received from ASME Main Committee or Subcommittee members who desire an official interpretation from the Committee.

As the ASME files will disclose, Mr. Hardin chose acceptable Committee procedure to personally propose an unofficial response to the inquirer in a letter which he wrote to the Secretary dated April 27, 1971. The Wall Street Journal article implies that I, as then Vice Chairman of the Subcommittee, assisted in preparing the response. This is not true.

•••

[2]

When the unofficial response dated April 29, 1971 was received from the Secretary, it is recognized that top level marketing people of McDonnell & Miller, Inc. did show a copy of the letter to a limited group of boiler manufacturers. This is considered a normal business practice in the marketplace. Instances of similar situations will be found in the files, such as, an inquiry received in 1967 on a related subject (see attached letters dated August 16 and September 21, 1967). In this case, the contents of the official response were made known to interested parties without adverse reaction from the inquirer. Admittedly, I am not acquainted with all practices of displaying inquiry responses, but I believe the contents of the subject matter of such letters are of general public interest.

After Hydrolevel received a copy of the subject matter inquiry response incorporated in a letter from the Secretary dated February 8, 1972, they prepared a letter of criticism which was directed to the Secretary on March 23, 1972 with copies sent to all members of the Subcommittee on Heating Boilers and the Main Committee.

At the Minneapolis May 4, 1972 meeting of the Subcommittee on Heating Boilers, I removed myself as Chairman of

the Committee and did not participate in any discussion of the subject. Upon recommendation of the Subcommittee on Heating Boilers, the Main Committee, at their May 5, 1972 meeting, voted to approve an official communication reply per the attached letter dated June 9, 1972.

In summary, this June 9 letter confirmed the intent of the original inquiry response, with a statement to the effect that there was no intent to prohibit the use of low water fuel cut-offs, having time delays, providing the termination of the retard function operates the cut-off before the water level falls below the visible part of the water gauge glass.

The above review, in my opinion, clearly indicates the subject inquiry was handled in a regular prescribed manner as outlined in the ASME Committee Procedure.

Although the statements in this letter are intended to cover an explanation of facts which may be subject to public scrutiny, I do not wish any of the contents of this letter to be released to the press, because I have no desire to formally respond to the subject Wall Street Journal article.

Very truly yours,

s/JOHN W. JAMES
JOHN W. JAMES

JWJ/lp
cc: Mr. L. P. Zick
Enc: Copies of letters dated—
Aug. 16, 1967, Sept. 21, 1967, June 9, 1972

Introduced in the
United States District Court
for the Eastern District of New York

[PX 5, p. AS-32 and Exh. 13; AX V. 87-90]

The Wall Street Journal, July 9, 1974

Knocking the Competition—
How Rival's Use of "Industry Code"
Report Created Problems for a Tiny Company

By Priscilla S. Meyer

NEW YORK.—For the past three years, Russell Rymer has spent more time defending his product than selling it.

Mr. Rymer is president of Hydrolevel Corp., a Farmingdale, N.Y. company that makes boiler controls—hardly the sort of product likely to fire a simmering controversy. Yet lately, controversy has stalked Mr. Rymer wherever he goes, especially on sales calls.

Just a few weeks ago, for example, he was in the midst of a demonstration when the customer glanced archly at the Hydrolevel control and snapped. "I understand this doesn't meet the industry code."

In Mr. Rymer's business, that's a very serious charge. The code of standards for manufacture and design of boiler controls is set by a professional group, the American Society of Mechanical Engineers. Failure to pass muster with the ASME makes a product virtually unsalable.

Though the ASME confirms that the Hydrolevel control decidedly does meet its standards, rumors to the contrary have circulated within the industry for some time.

Close ties and handicaps

The confusion started as a result of a marketing ploy of a competitor, Chicago-based McDonnell & Miller Inc., which through an intricate series of maneuvers, obtained and circulated a letter from the ASME implying that the Hydrolevel control didn't meet its standards. John W. James, an

engineer and vice president of McDonnell, concedes that company salesmen did point out to boilermaker customers that Hydrolevel's product might not meet code requirements "depending upon application." Mr. James, who also serves as chairman of the ASME committee setting boiler-control standards, adds "We consider this to be fair and honest competition."

Though efforts to knock the competition aren't unusual in obscure and technical markets, the Hydrolevel dispute raises serious questions about the close ties between the dominant company in an industry and the professional society that serves as the watchdog. It also illustrates the mammouth handicap facing an upstart (Hydrolevel's annual sales are $150,000) that chooses to pit itself against a substantial competitor (McDonnell has more than 85% of the annual $10 million boiler market) owned by an even larger company, International Telephone & Telegraph Corp.

The boiler controls responsible for the furor is called a low-water cutoff. For decades McDonnell has made the cutoff that is standard equipment on most boilers: a small device that floats in the boiler water and physically switches off the current when the water level drops too low. Insufficient water causes boiler damage and even explosions.

Hydrolevel's automatic cutoff

Back in the early 1960s', however, engineers who were eventually to become officers of Hydrolevel developed a more expensive electrical cutoff. It can be set to shut off the boiler automatically when the water in a glass measuring gauge reaches a given low level. The Hydrolevel control differs from other electrical cutoffs in that it employs a time-delay feature: About a minute elapses between the time the low-water level is reached and when the boiler is shut off. The reason for the time lag is that the ordinary splashing and surging of water in a steam boiler can sometimes trip the cutoff switch too soon, so that it burns on and off repeatedly as the water approaches the low level.

Early in 1971, at about the time McDonnell began acquisition talks with ITT, Hydrolevel made its first substantial sale—to Brooklyn Union Gas Co. The New York company replaced McDonnell floats on its boilers with Hydrolevel electrical controls. About the same time, the General Services Administration began considering the idea of using dual controls on boilers in government installations. Their idea was to pair McDonnell floats with Hydrolevel's electrical controls to achieve a safer backstop system.

A trail of skepticism

In April of that year, Eugene Mitchell, McDonnell's sales vice president, wrote what appeared to be a routine inquiry to the ASME asking for clarification of its operating code for boiler controls. Of particular interest to Mr. Mitchell was the section of the code stating that a boiler must be immediately shut off when the water level falls to the lowest point on the gauge. He wrote: "Is it permissible to incorporate a time-delay feature in the cut-off so that it will operate after the boiler water level reaches some point below the visible range of the gauge glass?"

What happened afterward was to have a profound affect on Hydrolevel operations. The ASME sent a reply to Mr. Mitchell, stating that if a time-delay feature were used on a fuel cutoff "there would be no positive assurance that the boiler water level wouldn't fall to a dangerous point during a time-delay period." McDonnell salesmen proceeded to show copies of the ASME's reply to their boiler manufacturer customers, thus sowing a trail of skepticism about time-delayed electrical controls. Indeed, many boiler makers interpreted the ASME reply to mean that Hydrolevel control violated its code.

What the McDonnell salesmen apparently didn't point out to their customers was that Hydrolevel's time-delayed control doesn't work the way Mr. Mitchell suggested in his query letter to the ASME. If the company's instructions are followed correctly, the cutoff should be set so that even with the time delay, the water level in the gauge won't fall below the safe level before the boiler is shut off.

Contracts evaporate

Nor did they mention the fact that Mr. Mitchell could likely have cleared up the misconception without writing an inquiry to ASME because one of his colleagues at McDonnell, Mr. James, was then serving as vice chairman of the society's boiler-code subcommittee. Mr. James, in fact, had just helped write the pertinent section of the boiler code, using, among other things, Hydrolevel diagrams.

Mr. James apparently knew of Mr. Mitchell's letter to the ASME. The customary procedure for handling such an inquiry, according to the ASME, would involve assistance and compliance of the subcommittee's vice chairman, then Mr. James. Indeed, records show that he received a carbon of the ASME's eventual reply to Mr. Mitchell.

That letter, signed by the ASME's secretary, didn't restate Mr. Mitchell's original question, thus compounding the misconception that a time-delay feature was dangerous. McDonnell salesmen continued to circulate the letter among their customers well into 1972 after ITT's acquisition of McDonnell late in 1971.

As the resulting rumors spread, Mr. Rymer began to see potential contracts evaporate. Mail from confused prospective customers began to pile up on his desk: "If I'm not mistaken, ASME doesn't permit a delay in shutting off the burner." read one received two years ago from an executive at Slant-Finn Corp., a Greenvale, N.Y., boiler maker.

The letters kept coming, despite a letter the ASME committee sent Hydrolevel two years ago, advising that "there is no intent (in the boiler code) to prohibit the use of low-water fuel cutoffs having time delays..." But in Mr. Rymer's view, the letter came too late. For by then, he had no idea who has seen the original ASME letter, who had received secondhand information or how to contact them all if he had been able to find out.

A matter for the courts?

Mr. Rymer did take the matter to the Federal Trade Commission, but no action has been taken. In a letter last

year to Mr. Rymer, an FTC attorney noted. "Examination of the information in our file doesn't disclose any act which is clearly subject to question under the antitrust and trade regulation statutes . . . with the possible exception of the (ASME) committee interpretation on acceptability of a time-delay low-water cutoff." Then he added: "Since that interpretation was corrected through a revised interpretation there is no further basis for corrective action by the commission."

The FTC apparently feels the dispute is a matter for the courts, but Mr. Rymer, noting Hydrolevel's pint-size revenues, feels his chances of taking ITT to court and emerging solvent are dim.

Introduced in the
United States District Court
for the Eastern District of New York

[PX 5, p. AS 18; HX V. 75]

The American Society of Mechanical Engineers

3125 Logan Drive
Pensacola, Florida 32503

July 25, 1974

Dr. Rogers B. Finch
ASME
United Engineering Center
345 East 47th Street
New York, N.Y. 10017

Dear Rogers:

I am enclosing a copy of a letter from Jim Roy, Secretary of Region XI, along with a copy of the article from the *Wall Street Journal* to which Jim's letter refers.

I am sure you are more familiar with the pertinent details of the situation than I am from reading this one article which may be exaggerated to make it more newsworthy, but it appears that some action on the part of ASME is required. If the facts are as stated in the article, it would seem that Mr. James should not only be relieved of his duties on the boiler code committee but he should also be kicked out of ASME for unethical conduct.

In addition, if the facts are as shown in the article, ASME should pay for a one page advertisement in all pertinent trade publications stating the facts and afirming that the Hydrolevel Control does meet ASME codes. In addition, a written letter of apology should be sent to Mr. Rymer.

I would like to request that this problem be placed on the agenda of the next meeting of the Executive Committee of Council for full discussion. Hopefully, the discussion will result in a solution and/or statement that can be passed on to members who may ask me and other officers of the society about this situation.

Rogers, I'm sure ASME did not intentionally get into this problem but we have nevertheless been seriously implicated (according to the article) and have been a party (unwittingly) to restricting Mr. Rymer from selling his product and we should take some action to remedy both situations.

Sincerely,

S/Paul T. Howse, Jr.

Paul T. Howse, Jr., P.E.
Vice President for Region XI
ASME

cc: Council
C.T. Carley

Introduced in the
United States District Court
for the Eastern District of New York

[PX 5, pp. AS 183-86; AX V. 91-96]

The American Society of Mechanical Engineers

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PROFESSIONAL PRACTICE
COMMITTEE ASME

•••

November 19, 1974

MINUTES OF MEETING
PROFESSIONAL PRACTICE COMMITTEE ASME

9:30 A.M., Tuesday, November 19, 1974
STATLER HILTON HOTEL
NEW YORK, NEW YORK

1. The regular meeting of the PPC was called to order by Chairman Charles C. Space at 9:30 A.M., November 19, 1974, with the following present:

C. C. Space, J. R. Booton, E. N. Friesen, H. B. Koning, C. H. Long, S. C. Leland, W. H. Metcalf, R. W. Mills, J. H. Palmer, R. .E. Roberts, W. A. Shearer, Jr., L. E. Sissom, and E. H. Walton of the Staff; Also part-time K. T. Knight, E. B. Mansfield, R. M. Nee, E. W. Nelson, and R. B. Robertson.

• • •

6. Review of action on ethics violation. Following the September PPC meeting, Mr. Space met with Mel Green and other staff members of codes and standards. The net result of the review with these individuals was that the Wall Street Journal article was slanted and included excerpts from information which, taken out of context, made a good story. Mr. Space proposed a resolution to be passed by the PPC. (This resolution was reviewed by M. R. Green, L. P. Zick, Chairman of the Boiler and Pressure Vessel Committee, and

W. L. Harding, Vice Chairman.) The Committee VOTED to endorse a resolution (attached) and to request that it be published in Mechanical Engineering.

An inquiry was raised as to what steps are taken by the Society to assure the qualification of members of Code Writing Committees. Two members of the Committee on Organization described the procedures of that body for this purpose when recommending appointment nominations to the Council. MOTION to advise the Committee on Organization to adopt a requirement that all members of Code Committees be members of a professional society in order to avoid conflict between the Canons of Ethics and the desire of the profession to be self-regulating. (The motion carried.)

• • •

Respectfully submitted,

s/ CHARLES C. SPACE
Charles C. Space
Chairman

Resolution

Professional Practice Committee

The Professional Practice Committee was requested to investigate the circumstances surrounding a July 9, 1974 Wall Street Journal article, alleging improper influence and use of ASME Codes and Standards by an ASME Committee Member.

PPC investigated the entire incident, and found no basis for further consideration of the issue. The committee normally would limit its statement to this information; however, the facts surrounding the case demand further comment.

The case centered on a Wall Street Journal article which implied that a boiler control manufacturer (Firm A) had sought a ruling from an ASME subcommittee of which an executive of Firm A was Vice Chairman. It further implied that the ruling, which was not favorable to Firm B, was influenced by this Vice Chairman, and used to the detriment of Firm B's economic interest.

The facts of the case are that the inquiry was processed and the reply prepared and issued in full accord with ASME policies and procedures. The initial inquiry was referred to the Secretary of the Boiler and Pressure Vessel Committee and, then, to the chairman of the subcommittee involved. This individual, not connected with either Firm A or B, prepared a response which was subsequently transmitted by the Secretary.

Subsequently Firm B wrote to ASME protesting the ruling. When the subject was referred to the subcommittee, the executive of Firm A (who had succeeded to the chairmanship fo the subcommitee) turned over the chair and did not participate in discussion on that item. When that subcommittee had completed its review, the entire subject was placed before the full Boiler and Pressure Vessel Committee which voted approval of the reply which was ultimately sent to Firm B in answer to its inquiry.

Since the matter received widespread publicity, the PPC feels that the members of ASME should hear a more objective reporting of the case, and in fact to commend the chairman of the Boiler and Pressure Vessel Subcommittee on Heating Boilers for conducting himself in a forthright manner.

It is unfortunate that those serving on ASME committees are periodically subjected to harrassment in their line of duty. We feel that strong support by the membership is appropriate when improper attacks are made on these ASME members.

As a corollary, the PPC committee chairman reviewed the current ASME procedures for handling code interpretation inquiries and for handling external correspondence on these sensitive issues. The current procedures were found to be extremely well founded—in fact, without strict adherence to these procedures, ASME codes, with their public safety goals, could not be as effective.

We commend those members who serve in this worthwhile activity.

Introduced in the
United States District Court
for the Eastern District of New York

[PX 17A at Exh. 14; AX V. 108]

The Wall Street Journal, April 7, 1975

Official at ITT Unit Destroyed Letters After Journal Questioned Some Practices

By Priscilla S. Meyer

NEW YORK—A retired official of an International Telephone & Telegraph Corp. subsidiary disclosed in testimony before a Senate subcommittee that last summer while he was still with the company, he destroyed certain letters in his file after The Wall Street Journal began questioning the unit's competitive practices.

"I was scared." John James told the Senate Subcommittee on Antitrust and Monopoly, which is investigating the effectiveness of voluntary industry standards. "I have been associated with code and standard-making activities for many years and this was the first time in all of that experience that I had had anybody question the propriety of the way I conducted myself in connection with this type of work." he said.

Mr. James retired in January as vice president, research for McDonnell & Miller Inc., a boiler-control maker acquired by ITT in late 1971. Simultaneously with his job at McDonnell, he served as vice chairman and then chairman of the American Society of Mechanical Engineers' boiler code committee.

Last July this newspaper reported on certain problems Hydrolevel Corp., a small Farmingdale, N.Y. maker of boiler controls, was having as a result of a marketing ploy of McDonnell, which has more than 85% of this $10 million annual market.

At issue were the circumstances under which McDonnell obtained and circulated a letter from the society, the industry standard setting organization, implying Hydrolevel's control didn't meet industry standards. Hydrolevel had just made its first big sale.

As a result of the letter, Hydrolevel saw potential sales dry up, even though the society eventually confirmed in a letter to Hydrolevel that its control did meet the standards. As of last July neither the Federal Trade Commission nor anyone else seemed much interested in Hydrolevel's plight.

Last month McDonnell officials testified before the Senate subcommittee that before sending the query to the society that resulted in the letter, they broached the question of an exchange of letters at a dinner in Chicago with T. R. Hardin, an insurance official who headed the society committee.

Next, according to testimony, came a carefully worded draft of a question about the type of boiler control made by Hydrolevel that was, in fact, shuttled back and forth between Mr. James and Mr. Hardin for suggested changes before it was officially mailed to the society (which then sent the question to Mr. Hardin for reply.)

It's the correspondence between Mr. Hardin and Mr. James over the first letter of inquiry from McDonnell that Mr. James said he destroyed.

Finally, Mr. Hardin replied to the society, and this is the letter that when read without the original carefully worded question incorrectly implied that Hydrolevel's control violates the boiler code.

Then, according to the testimony of Eugene Mitchell, McDonnell's vice president, sales, McDonnell prepared a looseleaf notebook for use at its regional sales meetings that included the misleading society letter. It also included a "personal and confidential" memo stating that time delay—the type boiler control made by Hydrolevel—"would very definitely be against the society's code." It told its salesmen "This should definitely be brought to the attention

of anyone considering the device which included a time delay in the low water cut off."

Mr. Mitchell accompanied the notebook with a speech. "The Opposition—Who They Are and How to Beat Them."

Mr. James said he disqualified himself from the society committee that took up Hydrolevel's complaint. The little company complained to the society when it discovered from potential customers the existence of the society's letter to McDonnell that implied Hydrolevel's control didn't meet society standards. Mr. James also testified, however, he later got back into the act and actually drafted a key paragraph of the final letter sent from the society to Hydrolevel.

The McDonnell officials testified they never discussed with anyone at the society the dinner and exchange of correspondence with Mr. Hardin, the destruction of that correspondence or the sales notebook that used the society's letter in connection with the "Beat Them" speech. Does the society believe it has been duped?

After reviewing the testimony, an arm of the society came up with a conclusion that appears in the current issue of Mechanical Engineering. It commends Mr. James on his testimony and says the Society's Professional Practice Committee "finds no improper or unethical conduct in his actions."

Introduced in the
United States District Court
for the Eastern District of New York

[PX 5 at Exh. 19; HX V. 69-70]

The American Society of Mechanical Engineers

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April 16, 1975

C.C. Space
Reynolds, Smith & Hills
P.O. Box 4850
Jacksonville, Florida 32201

Dear Charlie,

I received your letter concerning the problem with John James and his activity on the ASME Boiler and Pressure Vessel Committee.

I am extremely embarrassed to be a part of the resolution appearing in the March, 1975 Mechanical Engineering magazine wherein the Professional Practice Committee concluded John James conducted himself in the proper manner. As you stated this appeared to be in accordance with the facts in our possession at the time. However, somehow all of the facts were unknown. It seems to me the original position of the committee in which we asked Mr. James to appear might have ferreted out more information. I feel the testimony given in the Congress could have been known prior to the publishing of the March 1975 resolution.

I do not think it is good practice to have an arm of the Society investigate its own activities, therefore I propose if the Professional Practice Committee is to perform and assume the responsibility then it should pursue the following steps:

1) develop a hearing procedure

2) require those in question to appear in person or automatically be deprived of their membership

3) a complete record of the hearing be made and the gist of the hearing be reported to the membership

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[2]

In areas of code preparation we could well have conflicts of interest and somehow non-partial review boards should be established.

This is not to reflect on any of the good work which has been done by the various Code bodies but rather to enhance their values by being able to refer to review procedure when confronted by those who might make the charge that the codes are self-serving to some of the supporting organizations.

At least it appears on the surface that our credibility as a Professional Practice Committee and a Society has been severely damaged.

Sincerely,
S/ Bill
W. A. Shearer, Jr.

WAS:pg

Introduced in the
United States District Court
for the Eastern District of New York

EXTRACT FROM DEPOSITION OF JOHN JAMES

[PX 16A, pp. 188; HX V. 196]

Q. Were you, during your entire time with McDonnell & Miller, on a regular salary?

A. Yes, sir.

Q. Did you get paid that regular salary during the time that you were working on ASME business?

A. Yes, sir.

Q. When you made trips out of town on ASME business, and you incurred hotel and travel, and other related expenses, who reimbursed you for those expenses?

A. McDonnell & Miller.

Q. Did they do that on all occasions?

A. Yes, sir.

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Introduced in the
United States District Court
for the Eastern District of New York

EXTRACT FROM DEPOSITION OF JOHN JAMES

(PX 16A, pp. 1149-51; HX V. 243-45)

[PX 16A, p. 1149; HX V. 243]

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Why if you saw a conflict of interest at the outset didn't you stay absolutely clear of this entire involvement and let Messrs. Harrison and Dow proceed and write their own reply?

A. Mr. Counsel, I sense that your question has three answers, is that correct?

Q. I'm not here to answer that kind of question. Please, if you understand my question, answer it.

A. The first part of your three-part question deals with the Section 4 subcommittee meeting, and I felt that when the Hydrolevel March 23, 1972 letter came up for discussion, it would be better if I relieved myself from the chair while the discussion took place.

May I remind you there are many discussions of a nature like this where the chairmen do not remove themselves from the chair.

As regards the question that deals with my reporting of this subcommittee to the main committee, my previous testimony endeavored to show you that this was committee procedure, and even though others could have reported this action who attended the Subcommittee on Heating Boilers, I saw no reason if I presented the

[PX 16A, p. 1150; HX V. 244]

facts of what occurred at that meeting as best I knew them that there was any objection to that, and as regards the last point, I felt that this was a matter that this subgroup was

considering and if I offered a suggestion, what was wrong with that.

Q. As of the time you offered this suggestion to Messsrs. Dow and Harrison, didn't you see a conflict of interest in suggesting a final paragraph to a letter that ASME was to send to Hydrolevel when you yourself as you knew, even if you hadn't reported to anybody else at ASME had in the first instance drafted the McDonnell & Miller inquiry which elicited the ASME April 29, 1971 response?

A. Mr. Counsel, how did I know when I sent that letter that the reply that Mr. Harrison would send to Mr. Zick would not have included Mr. Dow's last paragraph? I didn't know that they were going to accept my last paragraph.

Q. But you could have simply chosen not to interject yourself into the matter at all, and have made no suggestion to Mr. Harrison and Mr. Dow about the form of their letter. Why didn't you do that? Why didn't you stay clear?

A. I could have, but I didn't.

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[PX 16A, p. 1151; HX V. 245]

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Q. Did you see a conflict of interest in your chairing the consideration of the Hydrolevel matter on May 4, 1972?

A. I recognized a conflict of interest, but in that case I decided to have someone else chair the meeting, as I did in other matters coming before the subcommittee at subsequent times.

Q. What could represent a more flagrant conflict of interest than your including in a letter to the people who are supposed to draft a reply to Hydrolevel your suggested language for the ASME reply?

A. I did not consider this a flagrant conflict of interest.

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Introduced in the
United States District Court
for the Eastern District of New York

EXTRACT FROM DEPOSITION OF JOHN BONNER

(PX 2; AX V. 131-32)

[PX 2, p. 115; AX V. 131]

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Q. When you say you had no definite information about this lawsuit, what do you mean?

A. I didn't know what prompted, what brought about a complaint, and when Mr. Wrobleski showed me these two letters, the one inquiry from, I think it was an engineering firm or a boiler inspection firm, I don't know who it was, but to ASME, who was supposed to know all the answers in such matters, and when I read that reply immediately I could understand what somebody might think they were justified in complaining.

Q. What did you understand what might have been justified in terms of the complaint?

A. The inquiry in the letter was, is this device acceptable to you, do you recommend its being used,

[PX 2, p. 116; AX V. 132]

or should we use it. Words to that effect. And the reply was it creates a hazardous situation in that when used it does not cut off the fuel supply. That's the way they speak of it, cut off the fuel supply to the boiler so that the water remains visible in the gauge glass.

Q. That was the reply by the ASME as you understood it?

A. Yes.

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In the

United States District Court

For the Eastern District of New York

Extract from

Trial Testimony of Dominick De Leonardis

(Direct Examination)

[Tr. 36; App. 187]

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So I did contact ASME and talked to a Mr. Brad Hoyt, and he said that he would need more information, that he was very busy. He got 4,500 letters a day, I think he said, and he needed more information and couldn't answer me.

So I called Mr. Nobles back again, and I said to him, what is the date of the letter, and he gave me the date; it was April 29, 1971.

April 12—no, April 29, 1971, and he said—I asked him the contents of the letter and he really didn't want to get involved, but he read it hurriedly and I got some of it down, and then I recall that I called Mr. Hoyt again and he said that he would need more information, and I think I called—I think I talked about 4 times to Mr. Nobles and then finally told me there was a letter of April 12th. That this letter was a letter answering the letter of April 12th, and I asked him to send me a copy of the letter, and he said he couldn't send it to me. I asked him who showed him the letters, and he said morally he couldn't tell

[Tr. 37; App. 188]

me who showed it. I said, if this is public information that ASME sent out, why can't you show it to me, and he said, I have a moral obligation to someone, and I don't want to break that confidence, and I can't tell you who it is nor show you the letter.

Q. Did he indicate that he had given a promise to that person?

A. Yes.

I contacted Mr. Hoyt and sent him a letter. He said to send him a letter, which I did, and in the letter I requested a copy of the April 29, 1971 letter.

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[Tr. 41; App. 192]

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Q. Mr. DeLeonardis, in the letter which you received from Mr. Sutton of the American Society of Mechanical Engineers, does it contain the name of the addressee, Mr. Gene Mitchell?

A. No, it does not.

Q. Of McDonnell & Miller?

A. No, it does not.

Q. Does it contain the first introductory paragraph?

A. No, it does not.

Q. Mr. Hoyt to Mr. Mitchell:

"The inquiry contained in your letter of April 12th, 1971, was referred to the Chairman of the concerned Subcommittee who offers the following advice: . . ."

A. That was all deleted.

Q. What is the significance to you of the deletion of the paragraph making reference to the Chairman of the concerned Subcommittee?

A. If the paragraph was in, to me it would mean an official ASME ruling.

Q. Who was the Chairman of the concerned Subcommittee?

[Tr. 42; App. 193]

A. Ty Hardin.

Q. Did Mr. Hoyt or Mr. Sutton at any time disclose to you that this inquiry was posed by McDonnell & Miller, and that the reply was sent to McDonnell & Miller?

A. Mr. Hoyt said in the letter that it was of no concern to us who the addressee was.

Q. What was the concern to you as to who the addressee was?

A. They were our competitor. We would want to know that, plus the first paragraph makes it an official ASME ruling.

Q. Did there come a period of time in which they did send you a letter showing you the opening paragraph indicating that the reply was from Mr. Hardin—or rather the Chairman of the Subcommittee?

A. I believe the first time I saw that was just prior to going to the Senate Hearing down in Washington.

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IN THE

United States District Court

FOR THE EASTERN DISTRICT OF NEW YORK

EXTRACT FROM

TRIAL TESTIMONY OF DOMINICK DE LEONARDIS

(Cross Examination)

[Tr. 140; App. 293]

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Turning to Exhibit BM-1, if the last paragraph on the first page says:

In reply to our correspondence, ASME forwarded us the enclosed letter which clearly removes any

[Tr. 141; App. 294]

"objection against the use of time delays with low water fuel cut-offs."

And my question is, when you used the words "the enclosed letter", weren't you sending to Mr. Limoni at Slant/Fin a copy of the ASME letter of June 9, 1972?

A. Yes, I did

Q. Did you send it to other people, too?

A. I must have—I sent it to a few other people. Mr. Limoni never bought any controls.

Q. He never bought any controls? Was he the one who said they were too expensive?

A. No. He said it didn't meet the ASME Code.

Q. You showed him the letter?

A. And he didn't buy.

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IN THE

United States District Court

FOR THE EASTERN DISTRICT OF NEW YORK

EXTRACT FROM

TRIAL TESTIMONY OF MELVIN R. GREEN

(Redirect Examination)

[Tr. 648; App. 808]

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THE COURT: Would you have considered it proper yourself if he had asked you to have James step down – I don't know whether he did – and then participate in the drafting of a response.

THE WITNESS: I'm not so certain that it happened like that. It is my understanding that he stepped down in the subcommittee meeting, and then a recommendation went before that subcommittee to the main committee and then Mr. Zick, who was chairman of the main committee, suggested that a task group take a look at the proposed draft, and to come back with whatever re-wording, so it could be submitted to the whole main committee which would be in accordance with our procedures for a formal inquiry, and also it gives the inquirer the benefit of a greater distribution of the results of his inquiry if it is handled formally,

[Tr. 649; App. 809]

because you're sending it to over 300 people and these people have an opportunity to consider it and nearly a hundred of them have an opportunity to vote on the proposed thing.

I don't think it is this stepping down that was brought out and coming back and being-putting his own words there.

THE COURT: What happened? I'm not clear, so far as your inquiry showed what actually happened?

THE WITNESS: Well I've read, and I have to go by what I have read, that the task group considered input from Mr. James along with other input, and there was some change to

the proposed draft that went out to the main committee for final ballot approval.

THE COURT: I put the same question that I put a moment ago: If you stepped down because you're personally involved, and I take it that is the reason you stepped down, you consider it proper to then particpate in future deliberations on the subject?

THE WITNESS: In the Boiler and Pressure Vessel committee, the chairman of a subcommittee

[Tr. 650; App. 810]

has responsibilities. The chairman of the subcommittee who stepped down the next day was a member of the main committee, another body, and he had to report on behalf of the subcommittee that the subcommittee on Heating and Boilers, he was taking their works and reporting to the main committee.

I don't see anything inconsistent about that. This is his role and was at the time, and he was vice chairman at the time.

THE COURT: Assuming it was a passive conduit of information, I'll put it to you again: Do you consider it proper form to do more than partickipate [sic] in the drafting of the communication when he had stepped down, apparently because he felt there might be an impropriety or a conflict if he participated?

THE WITNESS: I don't think it is as clear as that. If he is helping the inquirer and if the evidence shows that he is helping the inquirer by an editorial change, then I think it is proper. Because he is doing it for the main committee then and he is not doing it for the subcommittee, the smaller body that considered the inquiry.

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF NEW YORK

EXTRACT FROM

TRIAL TESTIMONY OF W. BRADFORD HOYT

(Cross Examination)

[Tr. 718; App. 878]

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Q. Now please turn to page three, paragraph 4C.

That paragraph is, is it not, your express corporate authority as secretary of the Boiler and Pressure Vessel Committee to interpret the code?

A. That is the way I read it, yes.

Q. Now, the purpose of the Boiler and Pressure Vessel Committee was, was it not, to act on behalf of the council which is, I take it, and think you will agree, equivalent to the Board of Directors of the Corporation?

A. Yes,

Q. And you, Mr. Hoyt, as indicated on page 7, you were, were you not, an officer of the main committee, the Boiler and Pressure Vessel Committee?

A. That is correct.

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IN THE

United States District Court

FOR THE EASTERN DISTRICT OF NEW YORK

EXTRACT FROM

TRIAL TESTIMONY OF W. BRADFORD HOYT

(Cross Examination)

[Tr. 741; App. 901]

Q. Now, you have in section 8.01 a procedure, do you not, for responding to inquiries?

A. Yes.

Q. A says, that routine questions such as those fro [sic] printed matter, be handled by the secretary; that's you, is it not?

A. The secretarial staff, yes.

Q. So you would agree that the McDonald [sic] Miller letter of April 12, 1971, was not a routine inquiry under 8-A?

A. I would agree.

Q. Under 8-B, it says that letters which are indefinite as to the question, the inquiry, which is answered what paragraph of the code is referred to or incomplete and not clear, because of lack of blue prints or sketches, shall be answered by the secretary using the letter or one slightly modified as attached and marked with form A.

Now, the April '71 letter specifically referred to HG 605A of the code?

A. You are talking about the letter signed by Mr. Mitchell?

Q. Yes.

A. Yes.

Q. So in other words, 8-B doesn't apply, does it?

[Tr. 742; App. 902]

A. It does not apply.

Q. 8-C refers to commercial questions. Questions dealing with some competitive or commercial angle of the manufacturer's product.

This connection, the committee must exercise the greatest care, so it cannot be accused of compromising a safety code for commercial reasons.

Important questions of this kind must receive the consideration of the commitee.

However, it may be possible to handle some of the simpler inquiries of this type by using a letter such as attached and marked Form D.

Now, you did not treat the Mitchell letter of April 12, '71 as an 8-C problem, did you?

A. That is correct.

Under 8-D, it refers to approval of apparatus and designs, as has been customary for the secretary, it answers this type of inquiry with the letter shown in Form C.

And you did not treat the McDonald [sic] Miller letter under 8-D, did you?

A. That is correct.

Q. Under 8.02 with respect to the procedure, it is the procedure, is it not, for following by the

[Tr. 743; App. 903]

committees of communications and how to handle them?

A. Yes.

Q. So that it indicates, does it not, a considerable portion cannot be handled in the manner outlined above, and msut [sic] therefore receive the consideration of a subcommittee or the main committee.

And I take it then, just in the first instance, it is 8.02 which governed your actions or you made the judgmet [sic] that your actions were governed by an 8.02 procedure, did you not?

A. That is correct.

Q. Number 8.02-A, it says unofficial communications.

If the question has been previously covered by an interpretation or communication, it could be answered by direct reference to the code.

The subcommittee or special committee chairman shall outline the reply to be sent by the secretary.

An unofficial communication or in those instances where the secretary has answered similar answers previously, he may answer the inquiry based on previous replies.

Copies of unofficial communications should be sent to the chairman of the subcommittee involved.

I take it that you did not use 8.02-A as the manner for treating the Hoyt-Mitchell letter, did you?

[Tr. 744; App. 904]

A. It was answered in accordance with 8.02-A, because the inquiry was referred to the chairman of the subcommittee for his recommendation.

It says here, the subcommittee chairman shall outline the reply to be sent by the secretary.

Q. All right.

A. That is what happened.

Q. So you made the judgment that the Mitchell letter of April 12, 1971, was to be handled with the procedures under 8.02-A, did you not?

A. Yes.

Q. The fact of the matter is, there was no previous request for an interpretation under HG 605 with respect to a time delay incorporated into a low water cut-off, was there?

A. I could not find any.

Q. And you did look, did you not?

A. Yes, I did.

Q. And you previously testified under oath, consistently back in 1978, that this was no such interpretation, did you not?

A. To the best of my knowledge, there was no previous question raisded [sic] on that subject.

[Tr. 745; App. 905]

CROSS EXAMINATION

BY MR. WILLIAMSON (continuing):

Q. Now, you did not personally draft the body of the reply to the April 12, 1971, letter, did you?

A. That is correct.

Q. And you, when you received that letter of April 12, 1971, you did not, did you, even bother to look at the language of HG 605 of the Code, did you?

A. That is correct.

Q. Now, when you sent the letter of inquiry, you sent it to Mr. Hardin, did you not?

A. Yes.

A. Did you send that letter of inquiry to anyone else?

A. I don't recall offhand.

Copies might have been sent to the secretary of the subcommittee and to the chairman and vice chairman of the main committee. It must be in the record there someplace.

Q. Who was the secretary of the subcommittee at that time?

A. Ed Dow.

Q. And what was the area of his economic interest, as we have been referring to it—who was his

[Tr. 746; App. 906]

employer?

A. His employer, I believe, was Hartford Steam & Boiler.

Q. That is the same employer as Mr. Hardin's, is that not correct?

A. Yes– Well, I'm not positive whether Mr. Dow was a voting member of the committee at that time. He probably was not. In other words, he would be acting as secretary of the committee because of the convenient relationship that they both were in the same building.

Q. Now, at that time that you received that inquiry, did you have any knowledge at all as to what a time delay incorporated into a low-water cutoff was?

A. Not at that time.

Q. Did you check the file at that time contemporaneously to see whether there was an existing interpretation?

A. I believe I just answered that, yes.

Q. And you found none?

A. I found nothing relating to that.

Q. Now, even though the language says, "unofficial," would you agree with me from the point of view of the authority who issued it and from the point of view of its impact, it is as official as an "unofficial"

[Tr. 747, App. 907]

reply?

A. I would agree.

Q. In other words, it is entitled to the equivalent of official weight at the time that you, as a staff member's secretary, sent it out to the inquirer; isn't that correct?

A. That's right.

The use of the term "official" and "unofficial" as shown in the procedures is a purely internal matter for the committee.

Q. So as far as McDonnell & Miller was concerned, they were receiving a reply which had the equivalent of official weight.

A. That's right.

Q. And if anyone saw that letter in the trade they would view it as the equivalent of official weight?

A. That's right

Q. You did have some understanding in June of '71 as to what a probe type low-water fuel cutoff was, didn't you?

A. Only from a very layman's point of view. I believe all the members of the jury know as much about a probe type cutoff as I do.

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